

**ECONOMIC AND SOCIAL DYNAMICS OF PART-TIME
EMPLOYMENT LAW AS POLICY WITHIN THE
EUROPEAN COMMUNITY**

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ABSTRACT

This thesis explores the regulation of part-time employment, within a European Community (EC) context, examining law as an instrument of policy. The domestic policies of two Member States, the UK and France, are analysed as examples of alternative approaches to part-time employment. Conclusions drawn from such different national policies are re-explored at EC level, as is EC Part-Time Employment Policy itself, with the intention of explaining a weakened political interest in the regulation of part-time employment at EC level.

The thesis adopts a distinct theoretical position to explore the complex interweaving of economic and social factors at two levels - firstly, at the level of theoretical conceptions of labour market functioning and part-time employment and secondly, at the level of national and EC law as policy. This position is reached by drawing together the findings made by the advanced form of Labour Market Segmentation theory, which points to a consequentialist understanding of labour market functioning.

The focus is on two legal options of part-time employment policy - the application of Sex Equality Law and the application of the Principle of Non-Discrimination between Full- and Part-Time Workers. I analyse these routes from a consequentialist stance, taking issue with the causalist approach to both regulation and policy analysis.

I find that, irrespective of whether a policy has an economic or social goal, it relies on a certain conceptualisation of labour market functioning. I argue that, at present, national and EC Social Policies fail to follow the consequentialist recognition of market functioning and that EC Social Policy is in addition dominated by the economic and social dynamics of internal market functioning.

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I declare that the thesis has been composed by me and that the work is my own.

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3.3.94

Date

INTRODUCTION

This thesis is about the regulation of part-time employment within a European Community (EC) context, exploring law as an instrument of policy. The domestic policies of two Member States, the UK and France, are examined as examples of alternative approaches. National understandings of Part-Time Employment Policy are then re-explored at EC level, alongside EC policy itself. Parallels are drawn where appropriate, but on the whole the thesis is concerned with highlighting the main problems which have led to a weakened political interest in the regulation of part-time employment by EC means.

Part-time employment has emerged as an important employment form as part of a general process of far-reaching changes which have taken place in European labour markets from the early 1980s onwards. Its significance lies primarily in its rate of growth - for example, the overall percentage increase in part-time employment between the years 1983 and 1988 in ten EC Member States was 27.7%¹. In some Member States, this meant an increase of 68.4%². This must be seen in the context of the equivalent growth in full-time employment, which for the same period and for the same ten countries, was 2.4%³. In many circumstances, therefore, part-time employment appears to have increased to the detriment of a rise in full-time employment.

My main concern with part-time employment does not originate solely from its impressive development, however. Instead, it is derived firstly from the fact that part-time employment is conceptualised, rightly or wrongly, as "women's" employment and secondly, from the fact that it is a low paid and low protected employment form. In particular, my interest lies in how these factors, its "women's employment" label and its low pay status, are

1 cf. Com (90)228 final: p10. These figures exclude Spain and Portugal.

2 *ibid.* eg, The Netherlands.

3 *ibid.*

connected and, perhaps more importantly, how they are additionally and collectively related to its considerable growth rate.

In order to consider these concerns in the light of part-time employment regulation, the thesis necessarily touches on a large variety of new and emerging issues as well as long-established debates. A study of recent developments in labour markets involves an overview of Labour Market Theory, in order to establish why employers have chosen to create part-time employment; the question of gender necessitates a review of the structure of Sex Equality Law and a re-examination of the concepts of direct and indirect sex discrimination; the consideration of employment protection forces an understanding of Social Security provisions and related family policy concerns; an historical survey of draft EC part-time employment directives motivates the analysis of both the operation of EC policy institutions and the nature of EC policy discourse. Key phrases - old and new - are consequently explored and re-explored throughout. These include concepts such as sex discrimination, occupational segregation, women's employment behaviour, supply and demand factors, trade unionism, EC policymaking, labour market segmentation, social dumping, flexibility of working time and discrimination between full- and part-time workers. In short, the study of part-time employment law as policy straddles many exciting and diverse topics which converge on one another in an often confusing, but nonetheless activating fashion. The aim of this thesis is to begin a process of unravelling the resultant entangled web of ideas and policies and provide a clear and distinct picture of relationships and interconnections which contributes to the debate on part-time employment regulation.

Interest in the study of part-time employment comes mainly from three camps. The Labour Market Segmentation and Flexibility theorists⁴, the body of literature which is concerned with women's employment behaviour and labour market participation⁵ and writers

4 Eg. Bouillaguet-Bernard and Gauvin (1988a); Craig et al. (1985); Horrell and Rubery (1991); Pollert 1991); Robinson (1988); Walsh (1991).

5 Eg. Beechey (1992); Belloc (1986); Blanchflower and Corry (1986); Dale and Glover (1990); Martin and Roberts (1984).

involved with the large debate on Sex Equality Law⁶. It is also touched on in some of the literature on the Social Dimension of the Single European Market⁷ and, also, in literature concerned with general Rights' Law⁸. Within each of these debates, part-time employment is often considered from an angle which is specific to the field in question, sometimes only being mentioned in order to further more general theoretical positions. As a consequence, although part-time employment is a much discussed concept, understandings made by the various debates provide the reader with an often confusing and contradictory picture of the nature of part-time employment. This stems mainly from the fact that there is much discontinuity between the somewhat separate approaches to its study.

The main exception to this is Beechey and Perkins' book on part-time employment, written in the mid-1980s⁹. This book provides an overview of all the predominant issues linked to the study of part-time employment, giving summaries of the main theoretical and legal positions on part-time employment. Beechey and Perkins acknowledge, however, that the results of their empirical research are inconclusive and, indeed, should spark off further challenging enquiries, particularly on the way in which gender enters into the organisation of production¹⁰. Since their book was written, there have been many empirical studies commissioned (particularly in the UK) which do look at changes in organisation of production and supply further answers to the question of how employers are organising their firms. Running parallel to these, the debate on a suitable part-time employment policy has developed, especially within the context of regulating Social Policy at EC level. To a great extent, however, these approaches still remain separate. This thesis is concerned, therefore, with providing a distinct theoretical analysis of both part-time employment and part-time

6 Eg. Byre (1987); Ellis (1991); Gregory (1987); Luckhaus (1990); Prechal and Burrows (1990).

7 Eg. Grahl and Teague (1992); Hoskyns (1991); Hoskyns and Luckhaus (1989); Kempeneers and Lelievre (1991).

8 Eg. Dickens (1992); Dickens and Luckhaus (1990); Disney and Szyszczak (1984); Savatier (1988); Sedley (1980).

9 cf. Beechey, V. and Perkins, T. (1987).

10 cf. op. cit. note 9: p144.

employment policy, which draws on understandings made by all the main fields of contribution to the debate on part-time employment.

The method which I have adopted to do this results from a particular theoretical analysis of the primary concerns linked to part-time employment. This analysis is based on understandings made by Labour Market Segmentation (LMS) theory on labour market structuring. Original concerns which I use the theory to explore operate around a basic dilemma in understanding the growth of part-time employment. Can its rapid increase be explained solely by the fact that it is a low paid employment form, or does it serve some important economic function within the labour market which explains its existence? To answer this question, I have had to consider the question of the importance of the conceptualisation of part-time employment as "women's" employment. To what extent does the fact that large numbers of women work part-time influence its low pay status and what bearing does this have on its perceived and actual economic function? If the fact that part-time employment is worked predominantly by women (and especially married women) significantly affects its low pay status, does this indicate that "sexism" (in some form) is operating within the labour market? And, if so, in what form and in what way? Moreover, is this "sexism" integral to labour market processes and economic considerations made by employers, or is its primary function one which distorts otherwise neutral economic practices? Furthermore, how do the answers to these questions enable an evaluation of policy?

Using LMS theory, I realise in Chapter One of the thesis that the answers to these questions lie in the theoretical understandings made by the advanced segmentation model of economic and social dynamics, manifest in supply and demand factors. The relations between these factors determine the means employers choose to achieve their economic goals of flexibility of working time. In other words, the achievement of employers' economic goals depends on a certain relationship of economic and social factors, understood in terms of supply and demand factors. I apply this finding to my study of law as policy and focus on the means law chooses to achieve its acclaimed goals. I find that irrespective of whether

policies have "economic" or "social" goals, nevertheless they still rely on certain understandings of labour market functioning. As a result, I find that there are many similarities between the theoretical concerns of labour market functioning and the policy concerns. This is particularly exciting with regard to the question of labour market barriers, where I find both a theoretical and a legal questioning of the causes and consequences of barriers located within the labour market. All laws I explore operate on some understanding of barrier construction based on a conception of labour market functioning - the importance lies in how they understand it and whether they choose to question it. The value of Part-Time Employment Policy will, therefore, be in the way in which it understands barrier construction. Consequently, although the thesis is committed to the practical question of what type of legislative intervention best serves the interests of part-time workers, the chief focus of the thesis is on the underlying theories and models of labour market functioning and how these understandings inform political debates and policies.

The thesis is divided into four main parts. Part I (Chapter One) reviews the main ideas contained in general Labour Market Theory, focusing on LMS theory and theories of women's employment behaviour. Here, I learn that part-time employment is a segmented employment and this becomes the key to understanding its nature, in terms of the numbers of women working in it, its low pay status and its rate of growth. Segmentation, in its most advanced form, means that, firstly, there is specific socioeconomic mobility in the labour market (involving the concentration of distinct groups in certain segments); secondly, that there is an artificial structuring of the wage and labour allocation in all segments; and, thirdly, that there is an operation of sexism [and racism] which is integral to labour market processes. Through a model of "engendered segmentation", I describe how part-time employment is being structured and show how "sexism" is involved in this process. The model indicates that the low value attached to part-time employment by the operation of the market is not inherent in the nature of part-time employment and demonstrates how such market denial is occurring. Summarily, Part I sets the stage for the rest of the thesis, which is primarily concerned with the question of policy.

As a whole, the thesis covers two main legal options as they exist in national statutory law, before examining the potential for a comprehensive EC policy. Parts II (Chapter Two) and III (Chapters Three, Four and Five) are devoted to exploring possible legal strategies, which involve the re-evaluation of part-time employment by law. The first strategy is the application of Sex Equality Law to part-time employment: this is explored by reference to the UK position (Chapter Two). The second strategy is through the application of an equality principle - the principle of non-discrimination between full- and part-time workers on a *pro rata temporis* basis. This is explored primarily by reviewing French Part-Time Employment Policy (Chapter Three), but is also considered in depth through a comparison with UK Part-Time Employment Policy (Chapters Four and Five). Although EC policy is not discussed in these two Parts, clearly discussions of national laws will not be free of reference to the EC, in that they serve as examples of two EC Member States. At times, therefore, allusion is made to the EC within the analysis of national debates.

It is in the last Part of the thesis (Chapters Six and Seven), however, where all the main issues raised are re-explored solely in an EC context. Here, also, the EC dimension is added to national findings. Chapter Six explores the history of EC draft Part-Time Employment Policy focusing on the power relations of the policymaking institutions. Chapter Seven, adopting a somewhat different approach, considers the nature of EC Social Policy discourse. Both Chapters aim at providing explanations for the lack of an EC Part-Time Employment Policy.

There are certain limitations of a thesis of this kind. The thesis topic potentially covers such a large range of debates and fields of interest that I have been unable to explore all the issues connected to part-time employment. As a result, I have had to be selective. For example, I do not place much emphasis on the role of trade unions in labour market functioning, although I do realise their importance in the segmentation process¹¹. Additionally, although

¹¹ Other writers do acknowledge and explore their function. cf. Craig et. al. (1985); Kendrick (1981); Rubery (1978).

I examine UK Sex Equality Law as policy (which at times makes reference to EC Sex Equality Policy), I do not consider EC Sex Equality Policy as a separate topic. The justification for this lies in the emphasis of the thesis on Part-Time Employment law as Policy, rather than on Sex Equality Policy, whose limitations with respect of part-time employment are examined in Chapter Two. There is a large body of literature on EC Sex Equality Law¹², but this does not on the whole focus on EC SEL's conceptualisation of both national and internal market functioning. This, I feel, would make an interesting study and one most suited to further research.

I refer to the now European "Union" (after the coming into force of the Maastricht Treaty) as the European "Community" throughout. The thesis in fact focuses on the problematic aspects of EC Social Policy which have led to the signing of the Social Agreement of the Maastricht Treaty and indeed, most analysis of the EC does in fact refer to the time before it became a "Union". Finally, although I explore all the other political institutions eg. the Commission, the European Parliament and the European Council and the Council of Ministers, I do not consider the European Court of Justice as an institution in its own right. This is in some ways an inevitable consequence of the approach taken by the thesis to law as an instrument of policy, by contrast to the question of its application and interpretation by the courts.

Nonetheless, I hope this thesis makes a contribution to the re-thinking of part-time employment law as policy, by providing the reader with an alternative approach to analysing policy in terms of its conceptualisation of labour market functioning. In particular, I aim to reveal the limitations of adopting a causalist stance in both the evaluation of labour markets and the evaluation of labour market policy. Through a consequentialist understanding of labour market functioning, I examine how "sexism" operates in market functioning. I use my findings (the model of "engendered segmentation") to analyse and criticise two main legal

12 Eg. Ellis (1991); Finch (1990); Landau (1985); McCrudden (1987); Mazey (1989).

options for the regulation of part-time employment - Sex Equality Law and the application of The Principle of Non-Discrimination between full- and part-time workers. In this way, I hope to highlight both the limitations made by debates which have not yet adopted such a stance to policy analysis and the limitations of the policies themselves.

PART I

CHAPTER ONE - "LABOUR MARKET THEORIES AND WOMEN'S PART-TIME EMPLOYMENT"

Introduction

Labour Market Segmentation (LMS) theory has been highly instrumental in providing explanations for the structuring of part-time employment as it occurs in the UK and French labour markets. The original theories, based on studies of the US labour market in the late 1960s, sought means of solving problematic issues connected to the labour market, eg. structural unemployment, racial discrimination, employment and training of disadvantaged workers. One of the main questions asked was why Black workers were clustered into certain types of secondary employment. Subsequent analyses of the positioning of women in the labour market generally, and in part-time employment in particular, have drawn on understandings made by the theories to explain the concentration of women in low paid employment segments, notably part-time employment.

In its early form, LMS theory was known as dual labour market theory. This formulation has now been displaced by LMS theory, which has evolved considerably since its conception in the 1960s. Such theoretical development has come about both as a response to the drive for refinement of ideas and as a response to actual changes made in labour markets themselves. The chapter will trace these theoretical developments, illustrating them by reference to the labour markets around which they are formulated. The chapter will show that the early formulation of dual labour market theory was based on observations of US labour market functioning and that observations of UK and French labour markets have required the advancement of such theory to one which takes on board the operation of a more complex labour market segmentation process. The chapter finishes by specifically examining LMS

theory, in its most developed form, by reference to the growth of part-time employment in France and the UK.

LMS theory, in both its early and developed form, differs from neoclassical economic theory in its conceptualisation of a labour market. The main differences are as follows. In general terms, neoclassical economics understands the individual to be offering well-defined services to the open market. The individual's offers are considered to be voluntary and rationally chosen by the individual according to his/her utility of work. The extraction of these services does not cause any problem for the market. Pay, productivity and value are explained with reference to the attributes of the individual, eg. level of education, labour market experience etc. Relations of power and issues of social organisation are seen as being external to the market.

LMS theory dissents from this view. It argues instead that neoclassical market economics are distorted in practice. For example: LMS theory understands that the ability of the market to fully extract services from the individual will vary with the ability of the social organisation, in which the individual resides, to enable the individual to offer his/her full worth to the market. Another example of dissent concerns the linking of pay to value. LMS theory realises that this idea is at odds with the labour market experience of certain groups of workers, eg. women. Here, again, it is argued that social determination of discrimination holds implications for the neoclassical view of wage discrimination. In brief, LMS theory perceives the labour market as one which is structured in a hierarchical and distorted fashion, with relations of power and issues of social organisation being integral to the labour market and not being external to its economic processes. This chapter will explore these kinds of ideas in depth.

For many years, "women's employment" has been theorised by reference to dual labour market theory in attempts to understand the reasons for the clustering of women in certain parts of the labour market. While offering some critical modifications of the theory,

certain commonplaces of the dual labour market model have been taken for granted¹. More recent understandings of women's employment behaviour have adopted some aspects of the developed LMS theory, but there still remains a tendency to focus on true causes of the clustering of women into certain market segments². The chapter argues that this tendency ignores certain key findings of LMS theory in its most advanced form.

The chapter strives to answer two main questions: firstly, why the diverse employment structures, which can be discerned in the labour market, exist at all and, secondly, what the consequences of the ghettoising of women in certain employment structures can be. The chapter, in reviewing the "causes" of the nature of part-time employment as offered by the theories, will place its own emphasis on the "consequences" of the nature of part-time employment. The reason for the shift in approach will become clear as the review of the theories develops.

Finally, the approach adopted by this chapter is made in the context of the examination of economic and social dynamics of part-time employment policy in relation to the European Community. LMS theories indicate the existence of certain labour market distortions which, if recognised at Community level, could strongly influence the means chosen to meet European Community Treaty objectives, such as the goal of balanced economic growth³ and the goals of free movement of goods, services, workers and capital⁴. Distortions highlighted could, therefore, have strong implications for the type of policy needed at Community level, in its regulation of the Single Market, including perhaps the regulation of part-time employment itself.

1 cf. Barron, R.D. and Norris, G.M. (1976).

2 cf. Beechey, V. and Perkins, T. (1987).

3 cf. Article 2 EEC Treaty: cf. Chapter Seven for discussion on this.

4 cf. Article 8a EEC Treaty.

Dual Labour Market Theory

Through an exploration of the development of LMS theory, this chapter will ultimately show that the "segmentation process", to which part-time employment is linked, is caused by a combination of demand and supply factors, which are hard-to-impossible to separate. However, the LMS theory only understands this fully after a certain amount of time and research. The development of the theory, with regard to the "causes" of segmentation, begins by looking at demand factors and economic explanations of segmentation, and evolves through the study of supply factors and social, political and legal reasons. Our starting point is the US labour market theories of the 1970s, and especially the theories of Doeringer and Piore⁵ and Edwards⁶. These early theories are based on observations of the US labour market and so their applicability to the UK and French labour markets may be limited. However, they form the basis for the subsequent development of the LMS theories and an overview of the main ideas they contain is fundamental to any understanding of the recent changes taking place in European labour markets.

The origins of the concept of "segmentation" are located in what is termed dual labour market theory⁷. The labour market is understood by the theory as being divided into two sectors or segments: a primary sector and a secondary sector. As dual labour market theory evolves, it is seen that the sector in question is viewed as having an ascribed "function": the nature of this function is heavily dependent on the theorist in question. Examples of functions are "stability", "flexibility", "type of efficiency" and are explored throughout in context. In the early theory, Doeringer and Piore are unsure as to whether there is discontinuity between the two sectors, but as the theory develops this is shown to be the case. To mark this development, sectors are re-termed "segments", in that the divisions between them amount

5 cf. Doeringer, P.B. & Piore, M.J. (1971).

6 cf. Edwards, R.C. (1979).

7 This is explored in great detail by Doeringer and Piore cf. op. cit. note 5.

to barriers which limit the free movement of workers from one segment to the other. Finally, specific groups of workers are seen to be located in each sector or segment, with a concentration of ethnic minority groups and women workers in the secondary market. Sex and race are therefore "issues" to be considered in relation to segmentation.

The Primary Sector and the Internal Market

One of the initial questions Doeringer and Piore ask is why Black workers are concentrated in secondary labour market jobs. Doeringer and Piore go about answering this question by first theorising the primary sector of the labour market. Doeringer and Piore assert a strong association between the primary sector of the labour market and the concept of an internal labour market (ILM). They understand that the primary sector is composed of what is termed "firm-ILMs", ie. a firm or enterprise operating as an ILM. They research the primary sector through a detailed study of the origin of this ILM and the pricing and allocation of labour within the ILM. They use their results to formulate ideas for the purposes of improving Federal policy in the areas as described above, eg. training disadvantaged workers. An overview of their understanding of the operation and nature of the ILM will be given here, but it is important for the overall focus of this chapter to begin this section by answering a question which is prior to the one asked by the theory. This prior question asks why an employer would choose a particular employment structure at all, especially when this employment structure is not one predicted by neoclassical economics.

At this early stage of theory, the ILM is seen as an investment by the employer in human capital which is firm-specific, eg. on-the-job training. The efficiency sought is a moderate and long-term one, with the firm having the ability to survive over a period of time in a changing labour market. The ILM exists, in this sense, to provide a long-term solution to problems of the economic market, by acting as a buffer to market fluctuations. This is in contrast to the competitive market, where efficiency is more immediate and directly affected by market fluctuations. The ILM efficiency is effected by the employer achieving a

minimisation of labour costs (eg. cost of labour turnover) through a particular employment structure. Output is expected to remain at a moderate level.

The creation of the ILM must also be seen in the context of a particular stage of economic development in the US labour market. Firstly, pre- and post-World War II USA saw Capital being increasingly concentrated in monopolistic enterprises. Secondly, the development and improvement of Technology was becoming increasingly important. These two main stages are indicated by the growth in big business (eg. IBM) and a growing demand for a variety of skilled work, in particular firm-specific or enterprise-specific skilled work. At this stage of the LMS theory, therefore, the employer's reasons for choosing the structure of the ILM are located in the economic system.

According to Doeringer and Piore, the ILM operates as a quasi-protected labour market. It comprises an area which is carefully controlled by its own rules. The rigidity of the rules is paramount to the utility of the ILM: these rules function as barriers to external pressures. This in turn limits the disruptive effect that external market forces can have on the operations of the ILM and allows the ILM a certain stability, which is artificially contrived. The rules also control the setting of wages and the allocative structure of labour. Wages are not determined according to the neoclassical equation. They are, instead, artificially set by a complex system of job evaluation, which itself is dependent on ILM specific factors, such as "skill specificity", "on the job training" and "custom". Jobs are clustered in a hierarchical structure and movement upwards is based on "seniority" and "internal promotion". Points of entry into the ILM are restricted: this is a "closed" market. In short, the ILM is organised around a central opposition that weighs internal factors (which are centred on stability) versus the need to be economically "efficient" and respond quickly to external changes. ILM-specific factors will work in conjunction with external market forces and win or lose. Let us explore this in more detail.

Doeringer and Piore consider the ILM to be firm-based, ie. the firm itself operates as an ILM. Any firm operating in the labour market, which satisfies the criteria broadly described above, can be termed an ILM. The reasoning behind the existence of the ILM, as described here, is to establish an economic system which can be efficient over a period of time. The important aspect of the ILM, however, is that the efficiency of the system is based on a compromise of the employees' requirements with the needs of the most efficient economic system from the point of view of capital and technology. This earmarks a departure from the neoclassical presumption that "*the most efficient economic system is highly competitive*"⁸. Doeringer and Piore argue that the ILM extends the concept of efficiency to encompass a form of equity at the workplace. The ILM is designed both to the advantage of the employer and the employee and its ability to survive in a competitive environment lies therein. Consequently, it can be economically efficient and, at the same time, maintain due process at work. A good and useful summation of the theory is provided in the following paragraph:

*The structure of the enterprise internal market is influenced by management's interest in internal allocation as a means of promoting efficiency by reducing training and other turnover costs. The structure most efficient in these terms, however, is compromised by the workforce's interest in the internal market as a means of enhancing job security and advancement.*⁹

Doeringer and Piore list the primary factors which are considered to generate ILMs. From the employer's point of view, the factor in each case will be equated to cost, whereas for the employee, it will be equal to a degree of employment stability or security. Let us examine each in turn, beginning with "skill specificity".

"Skill specificity" refers to skills which are specific to a particular job within the firm. In this manner, they are firm-specific skills. This means that employees entering into the firm will not have gained the necessary skills from the outside labour market and that costs for training the worker must be borne by the firm. "Skill specificity" brought about by changes in technology will, therefore, incur an increase in the absolute level of costs to be borne by the

8 cf. op. cit. note 5: p190.

9 cf. op. cit. note 5: p57.

employer. However, "skill specificity" can be viewed as an investment, given that the employer will be training a worker for a job, which is specific to the firm. This in turn will ensure a reduction in labour turnover, thus reducing the costs related to severance grants and the recruitment and screening of new workers. "Skill specificity" works for the good of the employer in the reduction of overall costs and to the good of the worker in the provision of training and security, although this advantage is arguably offset for the worker by a loss of flexibility.

This approach can equally be applied to the idea of "on the job training", which itself quite obviously relates to "skill specificity". Again, any loss of costs brought about through time spent on the training are bargained for by the employer with the knowledge that such methods bring their own rewards. These rewards can be seen as the enhancement of technical efficiency, due to "skill specificity", and the strengthening of employee solidarity. Solidarity is judged as being a stabilising influence, although its potential disruptiveness is acknowledged as a constraint upon efficiency. This is best understood through the analysis of the position of "custom" in the ILM.

"Custom" is essential to the successful functioning of the ILM. "Custom" refers to informal rules of "know-how" and the transmission of "know-how" at the workplace. It has various purposes which are interrelated in a sophisticated manner. Firstly, "custom" is concerned with the relation of "group or worker characteristics" to "job characteristics". This is understood by looking at the roots of customary practice. "Custom" can originate from past practice or precedent at the workplace, ie. it can be created in the ILM itself¹⁰. But, "custom" can also stem from the internalisation of customs external to the ILM.

*certain customs are imposed by the work group from the larger community in which it resides.*¹¹

10 cf. op. cit. note 5: p23.

11 cf. op. cit. note 5: p24-5.

Arguably, Doeringer and Piore do not pursue the interrelation of these two different and separate roots of custom. The first may be specifically related to job characteristics, but at the very least, is related to the worker as a worker. The second is related to the "worker" as a member of a particular social group. The general term "custom" functions in such a way as to obfuscate this distinction. It does so by fusing those characteristics which are acquired at work by the worker and those which are acquired from outside the ILM. This confusion in turn has a very specific result. It gives rise to an idea that some workers "as a group" are more suited to working in the ILM than others "as a group", ie. certain groups display traits which are more akin to the characteristics required by the ILM. This means that certain groups are considered to be more employable by the ILM than others. This is the basis of one of the discriminations which the ILM gives rise to.

"Custom", theorised in this way, is important to the ILM. It is seen as aiding the ILM in its role as protector of its own workers. "Custom", which Doeringer and Piore also define as "*the product of psychological behaviour of groups*"¹², introduces a feeling of togetherness and sameness amongst the group of workers in the ILM. As a point of reference, therefore, it can be used to distinguish between those groups of workers which are considered as belonging to the ILM and those which are considered as belonging to the external market. In so doing, it acts as a barrier to external market pressures, by ensuring that the workers which it employs are not threatened by other groups in the labour market, on an equally competitive basis. This linking of "custom" to "characteristics" and to certain "protected groups" is crucial to the understanding of ILMs and will be considered again further on in this chapter.

Further, the rules of "customary law", as Doeringer and Piore call it, will have a great influence over other rules concerning the pricing and allocation of labour within the ILM. Acting as it does as a barrier, "custom" will at times be a major constraint on efficiency.

12 cf. op. cit. note 5: p23.

Remembering that the vehicle for the expression of customary law is the Trade Union¹³, it is clear that the stronger the union, the slower the ILM will be to respond to changes in market variables¹⁴. Thus, Doeringer and Piore regard the collective bargaining procedure as having a potentially negative effect on efficiency, given that the Union will attempt to uphold the feature of employment security. There are advantages too, however. From the employers' point of view, the impact of external change on the ILM must be minimised to keep costs down. Doeringer and Piore believe that the Unions can be important in enabling the re-thinking of customary practice to accept change and can therefore be used to increase flexibility in the workplace¹⁵.

Some of these ideas surrounding the functioning of the ILM can be found by referring to Edwards' scrutiny of the operation of its industrial structure¹⁶. Edwards is concerned with the ILM's ability to survive. His argument is as follows. ILMs have the capacity to survive because firms have managed to achieve a successful level of structural control over the workers. He argues that employers (which he classifies as capitalists) need control in order to make profit. In asserting this, he makes advances on Doeringer and Piore's argument that the industrial structure of the ILM is geared to being "efficient", by promoting the view that concepts such as "hierarchy" persist because they are profitable¹⁷. Through an historically-based exploration of control possibilities in US labour markets, he advances two main control systems which have survived: the systems of technical and bureaucratic control, ie. control through the technological organisation of production and control through the social-organisation structure. He re-examines the ideas of "seniority" and "stability" in this light. He argues, for example, that benefits paid to older workers, according to the principle of seniority,

13 This is how Doeringer and Piore understand the role of Trade Unions. cf. op. cit. note 5: p35.

14 The history of the role of Unions in printing in the UK is a good example here.

15 This is also a view held by Atkinson (1990b): p51-5.

16 cf. op. cit. note 6. Edwards' understanding of an ILM is also one which equates the ILM to a firm or corporation.

17 cf. op. cit. note 6: p viii.

refuting as they do neoclassical economic wage systems, can be seen as a control mechanism in order to inject loyalty and dedication to the firm. These latter traits, he argues, are not necessarily relevant to efficiency, but are "*extremely profitable nonetheless*"¹⁸. In this manner, Edwards introduces the idea that a specific industrial structure is not solely related to productive economic efficiency, but may exist as it does in order to make profit, through the exertion of control over its employees.

To summarise, Doeringer and Piore have invoked a number of ideas in connection with the functioning of the ILM. These can be listed as follows: "degree of openness"; "stability of employment"; "job evaluation"; "seniority"; "hierarchy"; "efficiency"; "skill specificity"; "on the job training"; "custom"; two sides of industry". Edwards has added the concepts of "control" and "profit".

The Secondary Sector

Much less time is spent on analysing the secondary sector of the labour market. This is ironic, given the original focus of Doeringer and Piore's study of disadvantaged workers, as it is in the secondary sector where workers with employment disadvantages are located¹⁹. This weakness is immediately apparent in the labelling "secondary sector", which amounts to a rather clumsy way of referring to "the rest" of the labour market. The remarks made at this stage by Doeringer and Piore are concerned in the main with describing the results of empirical studies. The theories are clumsy and leave themselves open to the criticism which ensued. Let us explore these points in more detail²⁰.

18 cf. op. cit. note 6: p152.

19 cf. op. cit. note 5: p163.

20 It will become apparent as the theory develops that much more is discovered about the nature of the "secondary sector" and indeed the study of part-time employment should go some way to elucidating this.

Doeringer and Piore describe the secondary sector as being made up of the following types of employment. Firstly, employment which is completely unstructured: jobs here resemble those in neoclassical theory²¹. Secondly, employment found in what they term "secondary ILMs"²². This means ILMs with "informal internal structures", with "many entry ports" and "short mobility clusters"²³. In short, low-paid and unpleasant work, with low job security and little, if any, promotion or hierarchical structure. Thirdly, the secondary labour market is home to specific groups of workers, namely ethnic minority workers and women. This is in direct contrast to the primary sector, which is mainly worked by white males.

The first observation to be made at this stage examines further the suggestion that certain workers are more suitable to certain sectors, as explored by Doeringer and Piore in connection with the ILM. In particular, I am concerned with the role of social organisation in determining the work behaviour of the individual. In their description of "custom" in the ILM, Doeringer and Piore make a statement, which is important to consider here:

*This conclusion suggests that internal markets may be especially effective for training precisely because they become social institutions. But it also suggests that social variables may be particularly important in the economic performance of individuals within such markets.*²⁴

Unfortunately, Doeringer and Piore do not clarify whether the social variables in question are external or internal to the ILM. This remains uncertain, especially if one remembers that the social variables connected with "custom" could be either a product of the working environment or brought to the workplace from outside. It is crucial to know whether Doeringer and Piore are indeed suggesting a mixture of internal and external variables, if any understanding of why a particular individual may be perceived of as possessing "suitable" characteristics for a particular sector is to be reached. Unfortunately, no such explanation is given. Nor, arguably, do they apply any such complex idea to their exploration of the

21 cf. op. cit. note 5: p167.

22 ibid.

23 ibid.

24 cf. op. cit. note 5: p27.

secondary sector. Instead, they make underdeveloped judgments on the interaction of the social structure and the economic demands of the secondary market. This is most marked by their proposals to improve the position of disadvantaged workers, which themselves centre on economic policy and make few suggestions for tackling the social structures.

The second observation to be made here concerns a frustration with their argument. Their underdeveloped theory cannot be used to try and answer a question, the importance of which will become increasingly clear. This centres on the "function" of the secondary sector. The role which the primary sector is believed to be playing in the labour market is described above. But, what value does the secondary sector hold, either to the employers themselves or, perhaps more crucially, in relation to the primary sector. Doeringer and Piore do not provide us with the theory to tackle this at this point in the chapter, but such questions will continue to be asked throughout.

Consequently, to begin to make these issues more precise, I would suggest that Doeringer and Piore's descriptions of the two sectors can be analysed in terms of three important aspects of "segmentation". Firstly, it has been seen that the ILM, being a protected sector, is very much a closed market. Movement into this sector will, therefore, be restricted to those groups of workers which are considered to display traits suited to the protected jobs. Within the ILM, movement will be upward, based on promotion. The secondary sector is a more open market, and the idea of many entry points indicates that movement in and out of this sector may be frequent, but is not really equated to promotion. Segmentation is thus related to the concept of socioeconomic mobility²⁵.

Secondly, it can be apprehended that the central difference between these two sectors relates to the rules of labour allocation and wage determination regulating the industrial structure. The primary sector's main distinguishing feature is its regulation. We are not talking

²⁵ This point is reiterated by Michon (1987): p25. He states the following: "segmentation is defined *a priori* by (i) discontinuity and (ii) as affecting labour force flows".

here merely about divisions in the labour force. Segmentation is apparent where each segment operates according to a different set of rules and the value of work is determined more by the rules than by its actual value. For example: a worker in the secondary segment might have a similar level of skill as a worker in the primary segment, but the latter will be paid a higher wage, because of the allocative structure of the ILM, with its stability-generating factor²⁶.

Finally, although it is not entirely clear whether it explains the race/gender division of jobs, segmentation is at least related to the notion of labour market disadvantage. This is apparent in Doeringer and Piore's explanation of inequality in the labour market. They see it as being the result of three factors:

*[firstly] the costs of adapting workers with various traits to the performance requirements of particular internal labor markets; [secondly] the influence of the secondary labor market, welfare, and illicit activities on labor habits; and [thirdly] discrimination.*²⁷

This amounts to a very interesting interpretation of labour market disadvantage and one can infer from this that demand side factors and supply side factors together cause inequalities and are involved in the process of segmentation. As noted above, Doeringer and Piore do not pursue this idea in relation to either "custom" or secondary labour markets, but the subsequent theories will attempt to do so.

Each of these aspects will be discussed at length throughout the rest of this chapter, as the arguments which make up the main body of LMS theory are concerned with the validity of each.

²⁶ This point is clarified in the subsequent analyses of the nature of part-time employment.

²⁷ cf. op. cit note 5: p183.

From "Dual Labour Market" To "Segmentation"

This next section describes four major shifts which take place in the theory towards the end of the 1970s and into the early 1980s. The first shift is made by Edwards²⁸, who argues that the characteristics of the different segments reflect the characteristics of the jobs in a particular segment and not the characteristics of the workers located in that segment. The second shift, also made by Edwards, gives shape to an idea, so far remaining in the shadows, that sex or race discrimination is not external to the labour market and that, in fact, labour markets can be seen to reproduce discrimination²⁹.

The third shift is made by Althauser and Kalleberg, writing in a collection of essays on the US labour market in 1981³⁰. The link between the firm and the primary segment is broken, as segmentation is now understood to be taking place within firms. Finally, greater numbers of "segments" are observed and defined progressively throughout the theories, culminating in Althauser and Kalleberg's typology of five separate segments. The change from "dual labour market" to "segmentation" is thus achieved. Each of these shifts will now be explored in detail.

The simple model of the dual labour market was soon re-examined by Piore³¹. He now asserted that there was, in fact, a recognisable distinction between an upper and lower tier in the primary sector. This advance is furthered and re-examined by Edwards³², who reiterates Piore's remark that research has now revealed three segments in the labour market. He classifies them as follows: the "*independent primary market*", the "*subordinate primary market*"

28 cf. op. cit. note 6.

29 *ibid.*

30 cf. Althauser, R.P. and Kalleberg, A.L. (1981).

31 cf. Piore, M.J. (1975): p126.

32 cf. op. cit note 6.

and the "secondary market"³³. The problem now is how to define each segment and in attempting to do so, Edwards produces some very illuminating ideas.

Edwards' concern with regard to the re-definition of segments centres on the suggestion that workers may display certain traits which are suited to a particular segment. He makes an important development with regard to such assertions, by strongly arguing that recent analysis has ...

*suggested that the fundamental differences are not so much among the workers as among the jobs the workers hold.*³⁴

Accordingly, Edwards will use an analysis of the job structure and job characteristics in order to re-define segments. For example: the independent primary market (IPM) employment is connected with such expressions as "occupational consciousness", "large returns", "general skills", "seniority" and so on. The subordinate primary market (SPM) employment is associated with "production and non-production jobs", "substantial returns to age and experience", "seniority", "presence of unions" and so on³⁵. Finally, the secondary labour market (SLM) employment is indicated by the "presence of casual labor", "lack of any worker rights", "dead end jobs", "little prospect of advancement" and so on³⁶.

The next important idea raised by Edwards concerns the nature of segmentation itself. As has been explained, Edwards locates the basis of segmentation in the workplace. He now attributes a different system of control to each segment:

*The SLM is the market expression of workplaces organised according to simple control. The SPM contains those workplaces [workers and jobs] under the "mixed" system of technical control and unions. And the IPM reflects bureaucratically controlled labor processes.*³⁷

33 op. cit. note 6: p166.

34 cf. op. cit. note 6: p166.

35 The ILM as previously described by Doeringer and Piore (cf. op. cit. note 5) is now believed to correspond more to the subordinate primary market than to the independent primary market.

36 For detail, cf. op. cit. note 6: p167 et seq..

37 cf. op. cit. note 6: p178.

The main distinguishing factor between the secondary sector and the other two segments is the absence of structurally based control in the former.

Edwards' focus on demand-side factors and their role in the segmentation process produces some important results. The realisation that one must look first at a job's characteristics (rather than worker characteristics) in order to place a job in a segment, clearly refutes any argument that either a particular group of workers "belongs" to a particular segment or that one can locate the segment by looking at the workers in it. Additionally, his focus on the relation between the system of control and the segment in question clarifies important understandings with regard to the role of the economic system in the segmentation process.

Edwards' limitation must be seen, nevertheless, in his failure to examine how factors outside the workplace shape demand-side factors. This would entail concentrating on influences on the economic system. To his credit, he does, however, acknowledge the forces of racism and sexism and their relation to the labour market. He notes that "*racial and sexual discrimination provide one set of forces leading to labor market segmentation*"³⁸. He argues that racial and sexual discrimination transcend segments. The visible differences that sex and race provide are used as grounds for discrimination in the selection of workers for jobs. Edwards uses this knowledge to highlight an argument which so far has remained in the shadows, but which is vital to LMS theory. LMS theory, unlike neoclassical economic theory, sees that labour markets, when segmented in the way described, tend to "*reproduce discrimination*"³⁹.

Let us relate the idea that labour markets reproduce discrimination to the remarks made by Doeringer and Piore on labour market disadvantage. It is remembered that Doeringer and Piore see labour market disadvantage as a result of three factors: firstly, the costs of

38 cf. op. cit note 6: p177.

39 cf. op. cit. note 6: p194.

adapting workers with various traits to the performance requirements of particular internal labour markets; secondly, the influence of the secondary labour market, welfare, and illicit activities on labour habits and thirdly, discrimination⁴⁰. Let us reconsider these points in relation to Edwards' claim.

The costs referred to in the first statement are surely dependent on an "assumption" made by the employer about the ability of the worker in question to perform the primary work. In other words, the "assumed" costs are themselves somehow related to both work habits and discrimination, which are used to determine the "suitability" of the worker to the ILM. If Edwards is correct, then discrimination is reproduced both within and outside the labour market. It is reproduced in both the external and internal structures. Thus, given that both work habits and discrimination can be determined by the "social" structures external to the ILM⁴¹, it follows that these costs are not separate from the "social" structure. This provides us with the beginnings of a model, which indicates that the "social" structure and the employment structure (including, perhaps, the social relations of production) are linked to the process of segmentation and, also, that race and/or sex discrimination is directly involved in this process⁴². Exactly how this model is structured is not explained by the theory at this stage, but will be developed by other writers.

The next main refinement of the theory is made by Althauser and Kalleberg, still writing on US labour markets in the late 1970s⁴³. They propose a new typology of five labour markets. They re-define the segments as follows: a "firm-internal labour market" (FILM); an "occupational-internal labour market" (OILM); a "firm labour market" (FLM); an "occupational

40 cf. page 22 of this chapter.

41 This is implied by Doeringer and Piore's second statement above.

42 In particular, it links "assumed" costs to "assumed" work habits and sex/race discrimination.

43 cf. op. cit. note 30.

labour market" (OLM); and, finally, a "secondary labour market" (SLAM)⁴⁴. Without going into detail, the major breakthrough made by this new classification is that the ILM is now no longer located within the firm, but can be found within occupational groupings (eg. the legal profession) and across firms. Conversely, not all the jobs contained in a particular firm belong to a particular segment. In freeing the ILM from the firm-based structure, Althauser and Kalleberg introduce the concept of segmentation into the firm.

The picture which they paint of a "labour market" will be seen to more accurately reflect both the UK and French labour markets in practice⁴⁵. Importantly, segmentation within the firm will entail "barriers" being established between different groups of workers within the firm. Different types of employment within the firm will accordingly be governed by different sets of rules and socioeconomic mobility within the firm will be restricted across segments. This amounts to saying that different groups of workers will be working alongside one another in the same firm, but with different contracts which establish a different degree of protection and rights.

This opens up the debate considerably, because now the theory is beginning to understand that there is a relationship between specific types of employment and segmentation, as opposed to specific types of firms and segmentation. This understanding is upheld by empirical studies conducted subsequently in the UK and France. For example: in Michon's survey of the usage of non-standard job forms in France, one of the main findings is the refutation...

*of a clear and direct relationship between, on the one hand, the type of plant and its product-market conditions, and, on the other, the use of non-standard job forms.*⁴⁶

44 Althauser and Kalleberg make a clear statement on the nature of the ILM, whether it be controlled by employers or influenced by professionals of a particular occupational grouping. They attribute three basic structural features to the concept of an ILM: "(a) a job ladder, with (b) entry only at the bottom and (c) movement up this ladder, which is associated with a progressive development of knowledge or skill". cf. op. cit. note 30: p130.

45 cf. Wilkinson, F. (ed.) (1981).

46 cf. Michon, F. (1981): p86.

This means that future theory must consider the reasons for using a particular job form, whether it be full-time or part-time, internal or external, and the process of segmentation. Developments along these lines will be discussed later on in this chapter.

Summary

To sum up: the development of the theory brings with it new insights into the nature of labour markets generally. Edwards invokes important understandings with regard to the industrial structure of the labour market. Doeringer and Piore hint at the role of the supply side, as well as the demand side, in the process of segmentation, but their theory remains muddled on this point. Ideas on the role of discrimination in the labour market realise its importance in the "causes" of segmentation, but do not go much further in elucidating the way in which this discrimination operates. Finally, Althauser and Kalleberg, like Edwards concentrating on job structures, reveal the extent and complexity of segmentation. All these theories contain good ideas, but none is adequate in its own right in the explanation of the changing structures within the labour market. There is also one major failure in all that has been discussed so far. Quite simply, these theories refer to male jobs and do not directly consider segmentation from the point of view of women at work. The next part of this chapter, therefore, will review theories and ideas which run parallel to the development of segmentation theory. It will be seen that these ideas have an impact on the evolution of the LMS theory as a whole and are in addition vital to any understanding of the creation of part-time employment.

Sexual Divisions and Segmentation

Doeringer, Piore and Edwards all note that discrimination on the grounds of race and sex is at play in the generation of segmentation, but none of these writers pursue this

realisation to formulate any satisfactory theory. Brown⁴⁷ sums up the dissatisfaction with Piore's claims in the following way:

*[Simply] because there is a certain degree of congruence between the divisions of primary and secondary labor markets and those of the racial structure, it cannot be assumed that the one can be collapsed into the other.*⁴⁸

This criticism can equally be applied to the linking of the secondary labour market with the sexual structure. The exploration of both race and sex discrimination is necessary to the understanding of segmentation. This thesis, however, limits the debate to the relation of sex discrimination to part-time employment and, consequently, this chapter will concentrate on sexual divisions.

Women's Employment Behaviour

Let us begin by exploring some of the ideas raised by the early segmentation theories, but this time with reference to women as a group of workers. This examination will start by looking at some of the results of Hakim's study of occupational sex segregation in the UK from 1901-1971, which provides evidence of women's employment participation over this period⁴⁹. The most important result to emerge from her study, from the point of view of this chapter, concerns the pattern of women's employment behaviour in the UK. Between 1901-1971 there was an increase of 390% in labour force participation of married women. Moreover, on close inspection, the study reveals that whilst the economic activity rate of women in the age category of 45-54 was on the increase, the equivalent activity rate of women aged 15-24 was decreasing. It would appear from the results that women, up to the beginning of the 1970s, have been leading a two-phase working life. Single women have entered the labour market at one time, then dropped out of the market for a number of years, only to re-enter

47 cf. Brown, H.M. (1975).

48 *ibid.*: p211.

49 cf. Hakim, C., (1979).

later as married women returning to work. Hakim describes this as the "*bi-modal pattern of female employment*"⁵⁰.

Apart from this observation, Hakim also finds other interesting results. Briefly, the growth in the numbers of working women has been concentrated in particular sectors and in certain positions. To give two examples: firstly, there has been a concentration of women in the services sector. Secondly, vertical desegregation is not the norm:

*the figures...show very clearly the trend for women to become over-represented in the lower grades of work and under-represented in the higher grades.*⁵¹

Her general argument is that occupational segregation continues to persist, despite the growing numbers of working women. This is in contrast to expectations held with regard to the impact women would have on the labour market, after a certain amount of time had elapsed⁵².

Bouillaguet-Bernard and Gauvin⁵³, writing on the nature of women's labour market participation in France, note a similar bi-modal pattern until 1975. Bouillaguet-Bernard and Gauvin argue that this profile has now disappeared and that the 1982 census shows that women's employment patterns now resemble those of men to a greater extent⁵⁴. However, there is still evidence of discontinuity for some women, which is specific and connected to the number of children a woman has. Although the pattern of discontinuity may differ from that of UK women (ie. the determining factor is the number of children, rather than the age of the youngest child), nevertheless it is specific to French women, as distinct from French men⁵⁵. Women are also concentrated in the services sector: in 1982, 75% of female wage earners were

50 *ibid.* : p4.

51 *cf. op. cit* note 49: p29.

52 These expectations are mainly based on a neoclassical view of labour markets.

53 *cf. Bouillaguet-Bernard and Gauvin (1988a) and (1988b).*

54 *cf. Bouillaguet-Bernard and Gauvin (1988b): p165.*

55 *cf. Kempeneers, M. and Lelievre, E. (1991).*

employed by firms in the services sector⁵⁶ and women's jobs are described as being unskilled, insecure, low-level jobs⁵⁷. Finally, as in the UK, in France occupational segregation continues to persist, despite the numbers of women entering the market. Other studies reveal similar results⁵⁸.

These results have interesting implications for the ideas raised above on the role of discrimination in the labour market. It is clear from the studies that women in the UK and France have been working in the labour market in a specific way and in specific jobs and in specific employment sectors⁵⁹. Their employment pattern and work behaviour is seen to be different from men's employment pattern and work behaviour. This, it will be argued, can be used as a basis on which to formulate "assumptions" about the way women work as a group. Let us analyse this assertion in detail.

Firstly, the bi-modal working profile seemingly suggests that women, as a group, are not obvious candidates for the "employment stability" ILM-related factor. The break in their employment career is also at odds with other ILM factors, such as "hierarchy", "seniority" and "promotion". All of these are themselves dependent on the idea of continuity which is the bedrock of "employment stability". In other words, although women's employment pattern may be stable, it most certainly is not "stable" within the meaning of the ILM factor. The fact that women work according to the two-phase model (or some form of discontinuity model) means that "assumptions" about their "employment stability" can become entrenched.

56 cf. Bouillaguet-Bernard and Gauvin (1988a): p48.

57 cf. op. cit. note 54: p181.

58 cf. Dutoya, C. and Gauvin, A. (1987). cf. Gordon et al. (1982): p204 et seq. who note similar developments in the history of US labour markets.

59 "Sector" here refers to industry, not segment.

Secondly, it is clear from various studies that service sector jobs have grown rapidly during the 1970s and 1980s⁶⁰. Obviously, employers will be looking for a labour supply with which to fill these jobs. At the same time, large numbers of women are re-entering the labour market. Again, employers' "assumptions" about the suitability of women's skills to service jobs may encourage recruitment of this group of workers, because it will be believed that this is an efficient means of reducing training costs.

Thirdly, as the service sector grows, peripheral employers in particular begin to recruit women as employees. The importance of this recruitment centres on the issue of pay. Peripheral employers will be particularly keen to employ "low wage employees" in order to enable themselves to minimise costs and so compete successfully with other employers. The fact that the majority of these women are married gives rise to a third "assumption" about women at work. As married women, they are assumed not to be the main bread-winner of the family. Their wage is consequently taken to be one which will complement a husband's salary. In this way, employers can consider women as a group to be "*potential low wage employees*"⁶¹ and this "assumption" links them to the secondary sector.

It can be deduced from the above that "assumptions" made about women as a group of workers will be ones that connect their working "traits" to secondary jobs: high turnover rate, employment instability, no need for training, low pay and so on. In fact, the first detailed consideration of this link between sexual divisions and the dual labour market is given by Barron and Norris, writing in 1976 on the UK labour market⁶².

60 cf. Rubery (1978): p25. Meulders & Plasman (1989); Dale and Glover (1990).

61 cf. Gordon et. al. (1982): p206.

62 cf. op. cit. note 1.

Barron and Norris' Model of "Sexism" and Segmentation

Barron and Norris' starting point is their understanding that, in Britain, the secondary labour market is first and foremost a female labour market⁶³. They explore at great length and with great insight the relationship between the requirements of the secondary labour market and the assumed characteristics of women as a group of workers, in order to understand why women are concentrated in the secondary market. They do so through an analysis of five main attributes required of secondary workers: dispensability, clearly visible social difference, little interest in acquiring training, low economism and lack of solidarity.

Barron and Norris understand the idea that the labour market reproduces discrimination. In order to explain how this occurs, Barron and Norris indicate the existence of a vicious circle with regard to the employment of women. However, they do not develop this idea fully and it is left up to the reader to infer precisely what the various stages on the circle in fact are. Hence, the circle would appear as follows: the implied starting point is the household structure of the division of labour. The starting point, within the labour market, is the selection of women by employers as "suitable" candidates for secondary jobs. Barron and Norris argue that, alongside education and training, employers may also use "sex" as a basis for selection. This is where sexist ideology comes into the circle. "Assumptions" made by employers attribute secondary characteristics to women as a group of workers (they are, in fact, attributed each of the five traits as described above). They are employed in the secondary market and consequently acquire the label "secondary workers". This produces...

*a vicious circle, which reinforces the discriminating power of the trait which was made the basis of the selection criterion, and the labelling process becomes self-fulfilling.*⁶⁴

The dominant reason for the employment of women in the secondary labour market is attributed to "ideological factors". According to their understanding, the household structure contributes to, but does not determine, sex roles at work. The structure of the labour market,

⁶³ *ibid.*: p48. Barron and Norris use the criterion of low pay as the indicator of the secondary status of a job.

⁶⁴ *ibid.*: p53.

which they understand to be a dual labour market, is one cause of sex roles at work. The "real" causes are ideological factors:

*ideological factors are both the cause and effect of women's inferior position in the labour market and within the family.*⁶⁵

Arguably, Barron and Norris are saying that the "assumption" made by the employer on the suitability of the woman to work in a secondary job is "sexist", ie. the original decision to employ women in the secondary market is based on "assumptions" about women. The assumptions can either be false ideology or are seen to be true, but the reason why they are true is because of social institutional structures outside the labour market, which are themselves structured in part by sexist ideology⁶⁶. Barron and Norris explore both false and true assumptions: in particular, they devote much time in demonstrating why it is that these "assumptions" may be true. For example, women are seen to have a high job turn-over rate, which is explained by their role in the family.

However, from their explanations of how the circle functions, it becomes clear to the reader that the employers' "assumptions", which can be seen to be "true", are based on women's behaviour at work, as well as at home. Barron and Norris do not develop this relationship between evidence of women's labour market behaviour and ideology. They obviously realise that there is an interdependence here of the original demand for labour and the continued demand for labour but they do not draw conclusions from this: they are primarily concerned with the "causes", rather than the "consequences" of the confinement of women to the secondary segment of the labour market. Additionally, for them, the dominant force is ideology, as opposed to economic justification based on evidence of women's employment behaviour. The importance of the relationship of evidence to ideology will be explored later on in this chapter. Summarily, the focus on origins leads Barron and Norris to examine how "sexism" enters into the defining of the supply of labour.

65 cf. op. cit. note 1: p47.

66 Barron and Norris do not expand on this point.

Barron and Norris develop further two aspects of segmentation, as drawn by this chapter from Doeringer and Piore's original exploration of labour markets. Firstly, they explore the role of sex discrimination and its relation to segmentation. They do this through their notion of a vicious circle, as described above. Their article consequently highlights the interplay of segmentation caused by sexism, and sexism caused by segmentation. This idea is neatly summarised by another US analysis:

*In one direction, labor segmentation influenced and limited employment opportunities for women and minority workers. In the other direction, the mechanisms reproducing discrimination and occupational segregation helped reproduce segmentation.*⁶⁷

Secondly, Barron and Norris explore the idea that segmentation is also about socioeconomic mobility. This is not immediately apparent in the model as described above. However, it is clear from their argument that they conceptualise sexism as operating like a barrier and, in so doing, they reinforce the observation that segmentation is all about structural barriers to movement. Furthermore, they indicate that any freeing of women with regard to employment opportunities will have to be tackled through the breaking down of barriers between the primary and secondary sectors⁶⁸. This would allow groups of women to move into male dominated primary employment and encourage the movement of men into the secondary sector. This itself would hopefully have the effect of reducing the stereotyping of sexist characteristics.

Further Views on the Role of "Sexism"

The belief that sexism is active in the segmentation process is held by many writers. For example: Kendrick⁶⁹ argues the point that women's family responsibilities do not automatically mean that women are "suited" to secondary jobs, echoing one of the arguments introduced by Barron and Norris. Women's secondary employment status is seen by her as

67 cf. op. cit. note 61: p204.

68 Underlying their piece is also the idea that labour markets reproduce discrimination, which is spelt out clearly by Edwards as discussed above.

69 cf. Kendrick, J. (1981).

the result of male control of all the processes of reproduction - "economic, political and ideological"⁷⁰. Her piece on the "extensiveness of patriarchy" views it as having a direct influence on economic factors. This is particularly marked when one considers "the conditions under which women supply their labour"⁷¹.

Dutoya and Gauvin⁷², exploring the results of a French study on the working conditions and the nature of female employment in France reach similar conclusions. They argue that the structure of industry and the social relations of production do not alone account for sex segregation. Sex segregation, they argue, cuts across segments and sexism is a separate force which segments workers within the labour market. This argument is made within the context of a Marxist approach to labour markets.

Craig et al., exploring the incidences of low pay and women also make this point in the following way:

*Women were relatively low paid...in all types of firms and industries. Low pay for women is therefore not a simple case of low productivity employment.*⁷³

This argument is clearly attempting to indicate a distortion in the neoclassical economic equation of wage to value.

The locating of where "sexism" enters into the process of labour market segmentation signifies the beginning of a drive to clearly identify "other" factors which influence economic decisions. The main ideas found in the debate on women's labour market behaviour are concerned with the role of "two systems" in the confinement of women to certain areas of the labour market. These systems are labelled "capitalism" and "patriarchy". There are two types of focus: the one which sees these systems joining to become one system, "capitalist

70 *ibid.*: p187.

71 *ibid.*: p187.

72 cf. Dutoya, C. and Gauvin, A. (1987).

73 cf. Craig, Garnsey and Rubery (1985): p75.

patriarchy"⁷⁴, and the other which sees them as essentially separate systems, but operating to the benefit of one another⁷⁵. What is revealed most clearly in the body of the theory is that these two systems do somehow interact with one another and heavily influence each other's structures. The overall emphasis of the debate is concerned with how the two systems operate to define the nature of the supply of labour. The limitation of this emphasis, with regard to the nature of part-time employment, is discussed in the final section of this chapter.

Trade Unions and Segmentation

Before drawing a synthesis of the ideas discussed so far, one other important factor in the segmentation process must be mentioned. This concerns the role of Trade Unions and their relation to segmentation. The main argument on this point is advanced by Rubery⁷⁶. Her belief is that Trade Unions in the UK have played an active role in the segmentation of labour markets. She places the development of Trade Unions within the development of the capitalist system:

*Trade Union development is not to be regarded as an exogenous influence on the labour market structure...(it) attempts to control the competition in the labour market that the capitalist system generates, and, further, adapts and restructures itself in response to developments in the economic structure.*⁷⁷

As capitalism develops, it creates new jobs and the subsequent need for new skills. It thus generates new supplies of labour and forces the existing labour force to protect its jobs. In other words, it is not just employers or capitalists who aim to protect their labour market, but workers too.

Although Rubery places much criticism on US theorists, it can be argued that much of her own argument is present in Doeringer and Piore, although perhaps not emphasised in the same way. Obviously, different labour markets operate in different fashions, and her main

⁷⁴ cf. Hartmann's notion of capitalist patriarchy: Hartmann, H. (1981). For a discussion on the relationship between the two systems, cf. Cockburn, C. (1984).

⁷⁵ cf. Barrett, M. (1980): Walby, S. (1988).

⁷⁶ cf. Rubery, J. (1978).

⁷⁷ *ibid.*: p33.

contribution is the highlighting of the important role which Trade Unions play in the labour market in the UK.

Other writers support Rubery's view, but extend her observations to the consideration of sexism and trade unions. This makes reference to the idea that Trade Unions are vehicles for "custom" at the workplace. It is argued that much of the "custom" itself contains sexist prejudice, because of the influence of external factors on internal customary practices. It is evident from what they say that Trade Unions have played an important part in ensuring that womens' jobs are kept separate from mens' jobs. This guarantees that women as a group cannot compete with men as a group. This argument echoes ideas raised in Doeringer and Piore of the linking of "custom" to "protected groups". One of the roles of Trade Unions in the UK has been in ensuring that this link is not severed. The main result has been Trade Union involvement in the overall divisioning of the workforce on the grounds of sex⁷⁸. The role of Trade Unions and part-time employment is explored in later chapters.

The 1980s - Advanced Theories of Segmentation

Throughout the 1980s, much research was done in the UK and France on notable changes taking place in their national labour markets. The overall outcome of these more recent studies is the provision of a picture of a discernable pattern of labour market re-structuring taking place in both countries. It becomes apparent that the re-structuring is occurring through a process of segmentation of the workforce. This is happening in the face of a changing economic environment and, in particular, in the face of pending (and actual) recessions. What emerges from the studies is the realisation that firms in both the UK and France are adopting a variety of new kinds of employment relationships to meet similar ends.

⁷⁸ This point is examined later on in the thesis with regard to part-timers and trade unions: cf. Chapter Four. cf. also Craig et al.'s study (op. cit. note 73) which revealed the influences that Trade Unions had on the levels of pay set for women within the firm.

How and why such great segmentation of the labour market is happening is now a matter of debate.

Given the establishment of a large number of ideas and theories on the process of segmentation, plainly the growth in segmentation cannot be explained by reference to demand factors or even economic factors alone. Much of the theory is explicit on this point. For example, Michon states that it is erroneous to explain "micro-economic tendency solely on demand factors"⁷⁹. Craig et al. make explicit reference to this in their repetition of Kendrick's argument, cited above, on the conditions on which women supply their labour:

*the analysis of labour market structure must include among its explanatory variables the conditions under which individuals and groups supply their labour.*⁸⁰

De Gaudemar, writing in the late 1980s, asserts that there is no longer such a thing as "supply" and "demand", and in fact perhaps there is only one process to be considered here: the process of wage setting⁸¹. In general, the segmentation theory is concerned with the apparent collapse in supply and demand factors as separate entities in the labour market process.

In the next section, I will review the main ideas on the "causes" of new employment strategies adopted by employers, with the hope of providing a background against which the role and nature of part-time employment can be comprehensively explored.

Flexibility and Segmentation

During the 1980s, the segmentation debate moved in under the heading of "flexibility". But, what does this mean? The best starting point in an attempt to answer this question is a comparison of two writers' views, one French and the other British, on the use of "flexible" forms of work. These writers are Brunhes and Atkinson respectively⁸². Although talking

79 cf. op. cit. note 46: p97.

80 cf. op. cit. note 73: p87.

81 cf. De Gaudemar, J.P. (1987): p109.

82 cf. Brunhes, B. (1989) and Atkinson, J. (1984).

about two different labour market situations, their understandings of "flexibility" are remarkably alike and it is intended here to concentrate on the similarities rather than the differences of their approaches.

Many of the articles on "flexibility" use the term "flexibility" very loosely. To remedy this, plain distinctions need to be made between the four aspects of "flexibility". The first concerns the need for "flexibility" on behalf of the firm or the employer. The second concerns the type of flexibility required. The third considers the means by which a particular "flexibility" is achieved. The fourth concerns the need for "flexibility" on behalf of the employee or worker. Let us deal with each in turn.

Brunhes unequivocally places the requirement for "flexibility"⁸³ in the economic system. He opines that the growing economy in France has brought with it a call for an abundant labour supply. At the same time, a series of economic crises have resulted in the provision of a large and ready labour source and a growing need among employers to be able to hire and fire workers according to product demands.

Running parallel with this are other factors which affect the need for "flexibility". Firstly, there are the costs associated with the purchase of modern technology. The employer will desire to use this equipment to a maximum degree and thus require workers to be working at all times of the week. This means extending working hours to the maximum and breaking up working time. Secondly, changes in product markets require flexible adaptation processes by employers. This results in the need to vary the number of employees working and also to vary the skills of the employees who are working. Thirdly, continual improvements in technology, especially in the tertiary sector, will require an equivalent adaptable and skilled workforce. Finally, the internationalisation of markets brings with it an increase in competition and the resultant need to be flexible.

83 "Flexibility" is understood here in the sense of need on behalf of the employer.

Atkinson repeats these arguments, mentioning international and national recession, increasing competition, technological change and the like. Both authors, therefore, consider the need for "flexibility" to be one which is "economically" based.

Brunhes and Atkinson now go on to distinguish between a variety of different types of flexibility. Although they use different classifications for each type, it is possible to interpret their definitions in a compatible fashion. Atkinson singles out three kinds of "flexibility" - functional, numerical and financial⁸⁴. Brunhes identifies five forms of "flexibility"⁸⁵. The problem with Brunhes' delineations is, however, that he has confused the type of flexibility in some cases with the means of achieving a type of flexibility in others. Nevertheless, Atkinson's three flexibilities are easily discerned within Brunhes' five and, moreover, are understood in the same way. A combined definition of each will be given here.

"Functional flexibility" consists of the need to redeploy a group of workers quickly and smoothly between a variety of tasks and activities, which themselves are determined by fluctuations in production factors. This type of "flexibility" has a medium to long term perspective. "Numerical flexibility" is required in order to vary the number of hours in an efficient and cost-effective way. This is in response to changing demands for labour. "Financial flexibility" is sought in order to ensure that direct wages and other indirect employment costs are in line with the demands of external market forces. How the employer is to achieve either or all of these flexibilities is the central question to be answered here.

The means of achieving these flexibilities is spelt out in both Brunhes and Atkinson, but again the latter's methodology is more succinct. In basic terms, the employer will separate jobs using "skill" criteria and devise new employment relationships with his or her employees, which are suited to the particular flexibility in question. In this way, functional flexibility is

84 cf. Atkinson, J. (1984).

85 cf. Brunhes, B. (1989): p252-253.

achieved through a core group of workers who are full-time permanent employees. They agree to being employed in this way in the bargain for employment security. This resembles Doeringer and Piore's bargaining factor and, indeed, these workers constitute the primary segment of the firm. Job characteristics resemble those of the old ILM: "seniority", "hierarchy", "training", "internal promotion" and, finally, high levels of pay, artificially structured.

Numerical flexibility and financial flexibility can be achieved through different employment types. Atkinson discerns two peripheral groups. The first is composed of full-time employees, but unlike the core group, these employees do not have access to career opportunities or such high job security. The jobs which they are employed to do are "de-skilled" and not "firm-specific". The high level of labour turnover encouraged allows for the numerical adjustment to uncertainty in production. The second peripheral group consists of workers on short-term contracts, part-time contracts and job-sharing contracts. Atkinson argues here that the employer is attempting to...

*maximise flexibility, while minimising commitment to the worker, job security and career development.*⁸⁶

Finally, there are the external groups, temping agencies and sub-contracting. Brunhes explains this externalisation process which he describes as the displacing of the employment contract onto another employer or agency. This allows for changes in numbers of employees as a result of the change in the demand for labour. In conclusion, a variety of segments can be identified each with a differing purpose and function⁸⁷.

It must be remembered that since we are talking about the process of segmentation, all that has been learnt about it applies now. Accordingly, although "flexibility" itself may be an economic need, the way it is achieved through segmentation is dependent on a mixture of economic with "other" factors. These "other" supply-side factors can be "social", "political", "legal", whatever, but are present in the employer's choice of a particular employment

86 cf. op. cit. note 84: p17.

87 These segments can be divided into core and periphery, but the periphery groups are segmented. In this way, the model resembles Althauser and Kalleberg's typology.

relationship⁸⁸. Atkinson hints at the complexities when he presents us with five major factors which he considers to be determining factors in choice of strategy. These are as follows: technology, skill specificity and training costs, labour shortage, institutional pressures and national training provisions. It has been shown above that these factors are not neutral but are themselves heavily laden with assumptions and values.

This point is picked up by Tarling and Wilkinson in their article on the "level, structure and flexibility of costs"⁸⁹. Here they unequivocally state that:

*"Skill" becomes at least partly a question of organizational control and hence a social rather than a purely technical category.*⁹⁰

The main idea which their article gives rise to, however, concerns the idea of "labour shortage" (as labelled by Atkinson) or "labour supply" and its role in the segmentation process. Tarling and Wilkinson, with the help of a very useful model, discuss their understanding of the "options" which a firm has in the adaptation of its structure, and consequently its costs, to a changing environment. Basically, in order to reduce unit labour costs, a firm can juggle and re-organise any number of employment aspects. They offer three basic scenarios: firstly, the employer could change its employment contracts, through cutting wages, and/or intensifying labour, and/or relocating its labour. Secondly, an employer could re-organise the structure and operation of the firm. Thirdly, the employer could re-design the product or perhaps adapt to new techniques of production. These scenarios do not mutually exclude one another.

The idea to be presented here relates to the first scenario and concerns the nature of the supply of labour and institutional pressures. If the employer were to opt for this first scenario, this decision would be dependent on an "assumption" made about the nature of the supply of labour. Empirical findings show that married women have been a constant source of supply over the last two decades. Indeed, Brunhes shows that the supply of labour needed

88 Brunhes acknowledges the role of the law in limiting the "choice" of the employer, when opting for a particular form of "flexibility". cf. op. cit. note 85: p255.

89 cf. Tarling, R. and Wilkinson, F. (1987).

90 *ibid.*: p13.

for France's growing economy has been recruited for the most part from a growing supply of women and immigrant workers⁹¹. Consequently, were the employer to assume something about the desire of the worker for a particular form of working contract (eg. a part-time contract) then the employer is more likely to adopt the first option.

This must be seen in the context of costs, with the second two scenarios involving initial costs and much change. These latter two scenarios would also involve the agreement of the unions. It is much easier to employ a new unprotected labour supply in this instance. One can clearly discern from this how the decision to opt for a particular form of employment relationship in order to reduce unit costs is influenced by the supply of labour available, assumptions about its characteristics and the influence of existing industrial structures⁹². This point will be re-explored in the consideration of part-time employment.

Rubery⁹³ emphasises the point that firms in the UK have chosen a variety of means in order to achieve similar technological or production targets. This underlies the argument that there is no direct correlation between the "flexibility" required and the employment strategy chosen. Craig et al.'s study also emphasised a further belief, namely that the abundance of female labour is a determining factor in the employer's choice of working time arrangements. This will be explored in full in the consideration of part-time employment and flexibility.

A final and important observation, made by Craig et al. in their conclusions, must be voiced here and concerns the final aspect of "flexibility". Employers, for the most part in their studies, arranged the working time to suit the organisation's need. The "flexibility" which they were providing was a "flexibility" for the employer and not the employee. This point is noted

91 cf. op. cit. note 85: p251.

92 cf. Horrell, S. and Rubery, J. (1991): pv.

93 cf. Rubery, J. (1987), giving her own interpretation of evidence compiled by herself and others cf. op. cit. note 73.

by others⁹⁴. This observation is an expected outcome from the method chosen to achieve "flexibility". Flexibility is being achieved through segmentation. Segmentation itself causes inflexibilities in the labour market, as it creates barriers to free movement for groups of workers, the result being a concentration of "groups" (eg. women) in certain segments. Hence, flexibility for the employer is being achieved through inflexibility for the worker.

Let us now consider how the process of segmentation, with all this entails, can be related to the nature of part-time employment.

Part-Time Employment

As has been seen, ideas about the process of segmentation have evolved quite significantly over the years. Ideas have developed from those which understand the process in terms of demand factors alone, through to those which assert the interdependence of demand and supply factors, and onto those which maintain that demand and supply are no longer recognisable as distinct factors. Simultaneously, the extent of segmentation appears to have grown. We are no longer talking about two segments of the labour market, but many segments, each with their own characteristics and rules. The question to be answered now is where does part-time employment "fit" in the segmentation debate? Is part-time employment segmented employment? If it is, what type of employment is it? If part-time employment does not "fit" in the segmentation debate, what can be deduced from this? Does a detailed understanding of the nature of this employment have ramifications for the ideas surrounding segmentation? Does it help in our understanding of what segmentation is, or does it simply confuse even further the numerous opinions on the shaping of the labour market? This next section will attempt to answer some of these questions through an overall description of the growth and usage of part-time employment.

94 cf. Walsh, T. (1989): p47.

Demand for Part-Time Employment by Employers⁹⁵

The first reason to be offered for a demand for part-time employment relates to the idea that changes in labour markets require changes in working patterns. In particular, there have been some very specific changes, in both the UK and France, which have affected employment arrangements. The growth of the tertiary sector brought with it changes in industrial structures, technology and operational methods. This in turn resulted in changes being made to the regulation of the labour market, with laws being amended as necessary to accommodate economic and technological advances as desired by policies of Governments⁹⁶. Additionally, a squeeze on profits in the UK and economic crises in France at the end of the 1970s into the 1980s, caused employers to look for new means of controlling labour costs. Let us consider some of these observations separately.

In both Britain and France there has been a large growth in the services sectors of the economies. The growth of part-time employment is directly linked to the growth in the services sector. The evidence compiled by Meulders and Plasman, in their report on women in atypical employment, clearly shows that part-time employment in France is heavily concentrated in commerce and the services' sector⁹⁷. With regard to the UK, Mallier and Rosser⁹⁸ locate part-time employment in the distributive trades, educational and medical services and miscellaneous services. They claim that these industries provide 71% of total part-time employment opportunities⁹⁹. Pollert¹⁰⁰, writing about the labour market situation some

95 It is clear from what has been said, that the demand for part-time employment may, in fact, not be a separate factor: however, it will be attempted here to sort out "demand" from "supply" and then discuss assumptions made about both the demand and the supply.

96 cf. Mallier, A.T. and Rosser, M. J. (1980a): p3. The effect of laws on the segmentation process and the demand and supply of part-time employment are discussed separately in later chapters.

97 cf. Meulders, D. and Plasman, R. (1989): p12.

98 cf. Mallier and Rosser [1980b] :p25.

99 Elias and Main also link the growth of part-time employment to the growth in the services sector. cf. Elias, P. and Main, B. (1982) :p61.

100 cf. Pollert, A. (1990): p74.

ten years later, in 1987, states that 62% of the rise in women's service sector jobs has been in part-time employment. Marsh, writing in 1991, still notes a strong identification of part-time employment to the services sector¹⁰¹.

One economic reasoning to explain the strong correlation between part-time employment and the services sector would be as follows. The demand for a particular type of working arrangement relates to the product or service being sold to the consumer. For example: if a supermarket realises that peak demands for a service fall outside the "normal" working week, it will need to extend its working hours to cover this demand. Part-time working contracts can be seen as working arrangements which are suited to this demand, and which make sense from the point of view of costs. This idea is explained in some detail in Walsh¹⁰². Walsh argues that part-time employment is used primarily to avoid "*unutilized time of sales*"¹⁰³, and that cost savings, which amount to savings in direct labour costs, are of secondary importance to the employer¹⁰⁴. Manufacturing industries will have different operational methods, and so the most cost effective means of achieving changes in product demands will entail the usage of a different type of working contract. This reasoning explains the large usage of part-time employment in the services sector and not in manufacturing. Horrell and Rubery note this when they state that the...

*main sectoral differences were in the demand-related reasons for introducing changes in working-time.*¹⁰⁵

Another argument which is made in relation to the demand for part-time employment centres on the question of costs. This argument is as follows: employers demand workers who will work at a low cost for two reasons. Firstly, there is a need to keep costs low for

101 cf. Marsh (1991): cf. also Millward and Stevens (1986); Horrell and Rubery (1991).

102 cf. Walsh, T. (1991).

103 *ibid.*: p107.

104 This is based on the research of the retail, hotel and catering industries conducted by Walsh in April 1984: cf. *op. cit.* note 94.

105 cf. *op. cit.* note 92: p52. "Sectoral" here refers to industrial sectors.

competition reasons and secondly, there is a need to keep costs low because public sector budgets are being cut. The first reason explains some of the use of part-time employment in the private services sector and the second explains the reason for the use of part-time employment in the public services sector¹⁰⁶.

A final demand which employers make is the demand for workers who are "suited" to part-time work. This relates to the neoclassical equation of matching the "skill" of the worker to the "skill" required for the job. This point will be developed later, but is to be noted for now.

Demand for Part-Time Employment by Workers

Part-time employment is undertaken by women in the vast majority of cases¹⁰⁷: more precisely, it is the domain of married women. Hakim offers a profile of a typical working women in 1971 as being "*married and of a mature age*"¹⁰⁸. Elias and Main describe part-time work as the domain of labour market re-entrants. Mallier and Rosser make the connection between bi-modality and part-time employment. Bouillaguet-Bernard and Gauvin note that the most radical changes in France over the past two decades concern married women¹⁰⁹. They state that...

*Part-time work, in which women were already disproportionately involved, is developing at an increasingly rapid rate and women are the main participants in this increase.*¹¹⁰

It can be deduced from the above that there is a demand for part-time work by women and, in particular married women with dependents. This is backed up by several

106 cf. The findings of Horrell and Rubery (op. cit. note 92): p52. Re. France: the question of costs is slightly more complex than this. cf. Chapters Three and Five of the thesis on the regulation of part-time employment in France.

107 cf. Atkinson (op. cit. note 15) who says that in the UK 8/10 part-timers are women and that 4/10 women work part-time. Bouillaguet-Bernard and Gauvin hold that 86% of part-time jobs in France are held by women (op. cit. note 54: p185).

108 cf. op. cit. note 49: p11.

109 cf. op. cit. note 54: p164-5

110 cf. op. cit. note 56: p70.

survey results. Yeandle's¹¹¹ study conducted in 1980 of mothers of at least one child in paid employment established some important links between work behaviour and family care. The most crucial of these was the relation between having dependent children and working part-time. According to the June 1981 Office of Population Censuses and Surveys, 47% of women with children aged between 5-9 years worked part-time. This compares to the percentage of women with no dependent children working full-time, which was 50%. Yeandle focuses on the importance women place on their family lives and states that...

*the working hours of a potential job were important, since the job had to fit in with their other responsibilities.*¹¹²

Other surveys show similar trends. Martin and Roberts¹¹³ argued that women were choosing a job to fit into their family situation. Moreover, most women interviewed were happy playing out their family role and balancing this with part-time employment. Kergoat¹¹⁴ stresses the fact that, in France, the individual woman works part-time because of the continuing need to shoulder the burden of domestic responsibilities. Summarily, women are now choosing to work part-time and in many surveys it is seen that they are content with this. This is nicely summed up in the following manner:

*[part-time workers] valued their working patterns as social, controllable and flexible.*¹¹⁵

"Assumptions" and Part-Time Employment

The growth in part-time employment can be understood by the growth in numbers of women entering and re-entering the labour market at a time when the services sector was itself expanding. In this way, the supply of labour choosing this type of employment corresponded to the growth in the demand for it by employers for economic reasons and this can be used to explain its overall increase throughout the 1980s. This explanation is far from

111 cf. Yeandle, S. (1982): p422-429.

112 *ibid.*: p427.

113 cf. Martin, J. and Roberts, C. (1984).

114 cf. Kergoat, D. (1984).

115 cf. Marsh (1991): px - 3/4 of the respondents interviewed were satisfied with their hours of work. Horrell and Rubery's findings (cf. *op. cit.* note 92) in 1991 also support this view.

satisfactory, however. Segmentation theories show quite clearly how demand and supply factors tend to collapse into one another. It is important, then, to re-examine the usage of part-time employment in the light of the ideas of "sexism", "group characteristics", "skill", "efficiency" and the "conditions under which labour is supplied".

The best means of doing this is to follow the approach taken by Barron and Norris, and review employers' "assumptions" made about part-time employment¹¹⁶. The first "assumption" made by employers is that women choose to work part-time because they are "suited" to it and that is why they have chosen to do it. This is a neoclassical economic view of the labour market and most certainly does not understand that women might be limited in their choice of employment. It ignores many of the findings of segmentation theories, which explicitly demonstrate that one must look at the conditions under which the labour is supplied in order to understand how "choices" are made. These conditions are plainly described above as pertaining to the domestic role women hold within the family. Summarily, a lack of awareness by employers of women's role at home is discerned in economic reasoning of this kind.

However, surely this "assumption" is not wholly false. Indeed, it is evidenced by the fact that women have been working in part-time employment for years. Additionally, women do choose to work part-time. The "assumption" is, therefore, not incorrect at the level of reality. If women were not "suited" to part-time employment then the services sector would have collapsed years ago. And yet, the "assumption" remains problematic. Let us explore some more examples of this.

¹¹⁶ I have used "employers" here as this chapter focuses on employers' reasons for the creation of part-time employment. However, trade union representatives, trade union policy documents, senior conservative party members and, indeed, members of the legal profession have expressed similar views. Some of these views will be explored in later chapters on part-time employment policy.

A second spin-off from the idea that women are "suited" to part-time employment is related to training costs and skill. Most interesting findings are made by Walsh. Walsh explains how employers perceived women as a group of workers:

the nature of service jobs such as cleaning and cooking was viewed as "suitable for women" precisely because they had experience, even an "inherent aptitude", based on domestic responsibilities... basic skills were assumed "natural" and not highly valued.¹¹⁷

Unlike in the previous example, here employers do appear to be aware of the role their employees hold at home. In this instance, it is the "awareness" which is used in the economic reasoning. For example: if this perception is related to training costs, it becomes apparent that if employers consider that women possess the skills needed for the job in question, they will not perceive a need to train them to do the work. Again, as above, it can be seen from past experience that lack of training for women has not caused a major problem from the point of view of the success of the services sector. Nevertheless, the "assumption" once again remains problematic.

Another example can be seen in the "assumption" made with regard to the choice of the worker to work part-time, which relates to the justifications given by employers for lower rates of pay and unfavourable working conditions for part-time employees. The employer in this instance will be using the following rationale: part-time employment is not offered in other sectors of the labour market. Large numbers of women work in the services sector and in part-time employment. This means that part-time employment is attractive to women. Women also know that part-time employment is low-paid and can be unpleasant. They must have accepted these factors in choosing to work part-time¹¹⁸. Therefore, the employer is under no compulsion to improve the situation: "you get what you asked for" is the prevalent attitude¹¹⁹.

117 cf. op. cit. note 102: p112.

118 cf. op. cit. note 99 for details of worker preferences for jobs and what is offered by employers and firms.

119 This attitude is even upheld in the situation where the flexibility of hours is geared to the need of the employer and not the employee. This point is reconsidered further on.



A final "assumption" which is made relates directly to the level of pay. Part-time employment is, on the whole, low paid. One of the reasons for this is based on the "assumption" that the worker in question is not the main bread-winner of the family, and, therefore, does not need high pay in the same way as other groups of workers do (namely men). This, of course, is based on the knowledge that the great majority of part-timers are married women. In some instances, this assumption is compounded by the workers' own view of the importance of pay. Martin and Roberts' fieldwork revealed that women considered the "convenient hours" criterion as being more important than a good rate of pay¹²⁰.

These examples of "assumptions" are not easily recognisable as the collapse of supply and demand factors. This is surely what they represent, however. Exactly how this is occurring will be explored in detail in the next section, after a review of theories of part-time employment and flexibility. Two observations must be noted for now. Firstly, it can be deduced from the nature of the "assumptions" surrounding part-time employment, that it is impossible to make a straightforward assertion that employers are motivated to create part-time employment and perceive women as "suitable" workers for it solely because of sexist/ideological factors. Their decisions are based on the evidence of women as part-time workers, as well as economic considerations. However, the relationship between ideology and evidence of women's working behaviour is a complicated one which must be reconsidered in order to understand the growth and nature of part-time employment.

Secondly, it must be realised that the main consequence of these "assumptions" is that there is no marrying of any "skill" previously acquired in the labour market to the "skill" required by the job. It is to be noted that many of the women working part-time do have "skills" acquired from their first working phase (eg. teaching or nursing qualifications) and many of them are not in jobs which require any such skill. This is not to say that the jobs they do, do not require skill. They do, but these are not skills which have a high economic value

120 cf. *op. cit.* note 113.

placed on them. The net result of this is that part-time employment is not regarded by many as having a high economic value. This is found in opinions of employers and employees alike.

Part-time Employment and Flexibility

It must be emphasised at the outset that the relationship of part-time employment to the notion of "flexibility" is a complex one. Many of the inconsistencies found in the writers' understandings of this relationship result from a differing understanding of the notion of flexibility itself. Additionally, surveys of different sectors of the labour market produce differing results. Here, it will be attempted to provide as clear a picture as is possible of a confusing area, for it is felt that there are some assertions to be made.

Atkinson and Brunhes, as described above, clearly placed part-time contracts under the heading of a peripheral form of employment for the purpose of numerical flexibility or quantitative internal flexibility¹²¹. This amounts to a belief that part-time employment is being used in order to achieve a flexibility in working time. This understanding does not, however, explain why there are so many women working in this form of employment. Is it the case that flexibility in working time is only required by the services sector industry, where so many women are concentrated? Or is it the case that employers assume that they will be more likely to find an abundant supply of labour from women in order to fill the new jobs, and so go ahead and use this form of employment as opposed to other forms of employment¹²²? It must be remembered that within the flexibility debate, there is an argument which proposes that there is no direct correlation between the flexibility required and the employment strategy chosen. Let us remember that Atkinson and Brunhes also suggest other employment forms which will meet the aim of numerical flexibility. What other forms of employment, therefore, are used by employers in order to achieve flexibility in

¹²¹ cf. op. cit. note 85: p253.

¹²² cf. op. cit. note 89.

working time? Let us begin answering some of these questions by reviewing the findings of a study commissioned by the EOC on the flexibility of working time in the UK.

In 1988-89 a survey of twenty-nine establishments was carried out by Horrell and Rubery¹²³. Horrell and Rubery provide us with three reasons offered by employers to explain their need to achieve flexibility of working time. The first is to "meet variable demand", the second is to "reduce costs" and the third is to "extend working hours"¹²⁴. It will be remembered that all of these reasons are present in the description of the demand for part-time employment by employers as described above. However, the survey does not only find the usage of part-time employment to meet these ends. On the contrary, an enormous variety of employment systems were utilised. These included a large number of systems involving full-time workers. For example, in order to meet the requirement of extended hour coverage rotating shifts, fixed shifts, rotating days, separate part-time contracts for additional work, overtime and other systems were used for full-time employees. This would indicate that there are a variety of ways of achieving flexibility of working time using full-time contracts.

Where part-time work was concerned, twilight shifts, evening and weekend work, varying days of the week, night work, split shifts and overtime were used. The study also clarified the relationship between part-time employment and stability. While part-time employment is linked to flexibility, part-time work constitutes fixed hours of work. This would indicate a certain stability in part-time employment.

Women were seen to be working in all forms of working time¹²⁵. Indeed, Horrell and Rubery argue that the main determining factor as to whether women were employed in a

123 cf. op. cit. note 92. Here, the findings which relate specifically to part-time employment will be presented, although the survey produces some interesting and encouraging results in the employment of women in unsocial hours.

124 cf. op. cit. note 97 for a report on the twelve Member States of the European Community and the creation of part-time employment, which yielded similar results.

125 Clearly, women were able to work in all employment-type regimes and so any "assumptions" made by employers about women's likelihood of working in a particular employment system were held to be unfounded.

particular system or not, was whether women were employed in that particular sector or not¹²⁶. The study also revealed a link between the service or product being sold and the type of employment relationship sought. This means that one can explain the large numbers of women working part-time in the services sector by two factors: the fact that the services sector utilises part-time work to satisfy an economic need and the fact that this sector is highly "feminised". This rationale also explains Horrell and Rubery's conclusion that...

*systems involving part-timers were more likely to be used where women were employed, and overtime and shift-working were more common in male-dominated occupations and workplaces.*¹²⁷

There does seem to be a connection, therefore, between occupational segregation and working time arrangements. Horrell and Rubery argue, however, that working time arrangements do not cause segregation. Occupational segregation occurs as a result of other factors. Nevertheless, because occupational segregation exists, there are large areas of the workforce which are highly feminised and other areas where few women work. In the areas which are highly feminised, women work all hours of the day. Also, there is a large usage of part-time employment. Thus, the degree of occupational sex segregation can determine the degree and usage of women, in order to meet the economic requirements of the sector in question. So, the link between the product in question and working time strategy used, did not supply the sole explanation for the extensive use of part-time employment in the services sector. Horrell and Rubery summarise as follows:

*The differential labour utilisation must then be related to the process or service provision itself and/or perceptions of suitable workforces for these different jobs.*¹²⁸

126 There is a limitation in this study from the point of view of this thesis. Horrell and Rubery do not divide "women" into single/married categories. It is very hard, therefore, to make concrete assertions linking part-time work to married women, as opposed to any other group of workers.

127 cf. op. cit. note 92: pv.

128 *ibid.*: p24. My emphasis.

This latter point is argued extensively by Beechey and Perkins¹²⁹. They consider "flexibility" to be an insufficient reason for the growth of part-time employment for women. They recognise the importance of flexibility but do not regard the desire for flexibility as being the sole explanation accounting for the organisation of jobs on a part-time basis. They emphatically state that the "gender-factor" is a decisive factor in the construction of part-time jobs as opposed to any other form of employment, ie. that because many of the jobs in the services sectors are "women's jobs" the flexibility takes a particular form. In the manufacturing industries studied, they found that the employment of women on a part-time basis was related to job segregation. Similarly, in the public services sector, this was also the case. For example, with regard to portering in hospitals, which was done almost exclusively by men, they say the following:

*Arguments could easily be advanced for organizing portering on a part-time basis which are similar to those which we have advanced for women's manual occupations...Yet portering was done by men on a three-shift system while women's manual work was all part-time.*¹³⁰

Beechey and Perkins re-argue the case that labour markets reproduce discrimination and state that studies of flexibility need to be sensitive to the ways in which gender ideology and other non-economic considerations enter into the construction of different kinds of jobs.

Pollert also argues that the decision to use part-time employment is closely linked to both the sectoral structure, and to the degree of feminisation of the sector. She argues that the re-structuring of the labour market is being "caused", not only by the requirements of capital and changing product environments, but also as a "result" of sexism:

*the replacement of full-time by part-time contracts is not explained in a "core-periphery" dichotomy. Rather, what we see is the fragmentation and casualisation of work on gender specific lines.*¹³¹

129 cf. op. cit. note 2.

130 *ibid*: p101.

131 cf. op. cit note 100: p78.

Bouillaguet-Bernard and Gauvin, writing on part-time employment in France, also make this assertion. In France, they argue, different management methods are used for male and female jobs. This relates in particular to the manner in which working time reductions are being introduced. This applies not only as between sectors, but also within the manufacturing sector:

*The work-sharing programme has encouraged the development of individualised working hours and thus stimulated the growth of part-time work, but this employment form has remained exclusively female.*¹³²

It is apparent from the theories and evidence reviewed so far that both sexist ideology and sexist structures are contributing to the concentration of (married) women in part-time employment¹³³. It is clear from this knowledge and, indeed, from all that has been discussed so far that there is a need to explain more precisely how "sexism" operates within the labour market segmentation process. The next section will attempt to do this by looking once again at the construction of part-time employment for women.

"Sexism" and Segmentation - A New Model of "Engendered Segmentation"

Arguments contained in the debate on women's employment behaviour are keen to isolate the "causes" of the confinement of women to the secondary sector. The main limitation of this approach is that it places too small an emphasis on the findings of the LMS theory, which show a collapse of supply and demand factors. The debate on women's employment behaviour in fact operates around two oppositions in its attempt to understand the creation of part-time employment for women. The first opposition weighs "sexism" against "economic need" and attempts to answer the question "which factor truly determines the nature of part-time employment, "sexist assumptions" or "economic need?". The second opposition then plays

¹³² cf. op. cit. note 54: p185.

¹³³ Horrell and Rubery do not disagree with this argument. But they do make the point that it is all "disadvantaged" groups of labour who are exploited and work in the flexible low paying forms of employment. Although women are a larger group, they are by no means the only group. It must be remembered that the segmentation theory is attempting to explain the disadvantage and labour market inequalities of many groups eg. working-class men, ethnic minority male groups, as well as the larger "grouping" of women. Consequently, despite the fact that this chapter concentrates on the role of sexism, other factors within the labour market system will have great influence on the re-structuring of jobs as well. Horrell and Rubery's observations are more comprehensive than any which are made with regard to part-time employment alone.

out this question by arguing that part-time employment is created for women because of sexist "assumptions" made by employers about women. It then weighs "true" assumptions versus "false" assumptions and attempts to answer the question "are the assumptions made about women true or false?". This question is answered by the debate as follows: either yes, the "assumptions" are true, but the reason why they are true is due to institutionalised sexism¹³⁴, or no, they are not true and what we have here is an example of false ideology. The debate sets up these oppositions as a result of its focus on "causes".

Through the consideration of a model which poses the question of "consequences" rather than "causes" and, in so doing takes on board the collapse of supply and demand factors as recognised by LMS positions, I will now argue that the two oppositions are in fact false oppositions. The model to be presented here has taken shape as a result of the focus of this chapter on why employers choose particular employment structures and what the consequences of the confinement of certain groups to these structures may be. The model is keen to demonstrate where "sexism" enters into the segmentation process, through a description of the collapse of supply and demand factors, and unravel the complex relationship between "ideology" and "evidence". The argument is as follows.

Women supply their labour to the market in a particular way. Employers need to re-structure their workforce for economic reasons. Employers are also presented with a reality of women in part-time employment, of women in low wage jobs, in sum of women as cheap labour. It can be argued that supply side factors (eg. the existence of a stable supply of women workers) cost factors and institutional factors (eg. trade union position) facilitate the decision to employ women at this point (it could even be argued that supply side factors have already determined which strategy the employer will opt for¹³⁵). This decision is then abstracted

134 This is Barron and Norris' approach (cf. op. cit. note 1).

135 cf. Rubery and Tarling (1988): p126 - "Women's employment has been protected and expanded, not because women are progressively overcoming their relative disadvantage in the labour market, but because of the continued existence of these disadvantages which causes them to be an attractive source of labour supply to employers for particular types of jobs".

from features of women's employment in the past and built into the search for a "suitable" workforce, ie. it is built into the subsequent demand for labour. The abstraction is facilitated by ideology. By abstracting from reality and building the abstraction into the demand, the employer reproduces the discrimination. The consequence is that sex-related assumptions are structured in economic terms. In this fashion, a total collapse of supply and demand factors is realised, through a process of what I shall call "engendered segmentation".

Let us give an example of this process. An employer wishes to re-structure his/her firm for economic reasons (eg. the growth in competition on a worldwide scale). This reorganisation necessitates keeping costs low. The employer considers the supply of labour available and notes that, in reality, part-time employment is the domain of married women and additionally that it is a low paid employment. This can be evidenced by many research studies. Other factors of import include the level of unionisation (which is low for women¹³⁶=low cost) and other alternative supplies of labour (eg. migrant labour). Part-time employment would meet the requirement of the firm. The employer decides to employ women, based on women's labour market behaviour in the past. The employer does not consider why women have behaved in a particular way. This decision is abstracted from past behaviour. The abstraction is facilitated by sexist prejudice which assumes women not to be the sole breadwinner in the family (so pay can be kept low); it is facilitated by sexist prejudice which considers women as having natural skills for the job in question (no training = cost is kept to the minimum); it is facilitated by the assumption that women are financially dependent on a husband (so part-timers are not offered occupational pension scheme rights = low cost) and so on. The abstracted decision is then built into the subsequent search for "suitable" future part-time workers (it is to be realised that this "subsequent search" may be conducted by other firms). Moreover, the demand for "suitable" workers is now an "economic" demand, although heavily structured by sexist assumptions.

136 cf. op. cit. note 1: p57.

Unlike previous models which are concerned with how "sexism" defines the supply of labour (eg. Barron and Norris' model), this model of "engendered segmentation" attempts to show how sexism defines the demand for labour. The falseness of the two oppositions, which have defined the debate on women's employment behaviour up until this point, can now be demonstrated. The first opposition, which opposes "sexist assumptions" to "economic need", is seen to be false, as it is apparent that it is not a matter of an either/or question. Indeed, the entanglement of demand and supply factors is such that it is impossible to separate the "sexist assumption" from the "economic need" in the demand for labour. Moreover, this first opposition distracts attention away from the supply and demand question which is extremely important, especially with regard to the demand for labour.

The second opposition is now also seen to be false according to three realisations. Firstly, it is impossible to assert that an "assumption" is wholly true or false, given the intricacy of demand and supply factors. Secondly, this opposition polarises sexism at the level of ideas: it provides an explanation which is seen as being external to the supply and demand circle. The model demonstrates this not to be the case. Thirdly, this opposition is false, because its focus is solely on the supply side. The model clearly shows that "sexism" is reproduced in the structuring of the demand.

It is apparent from the model presented above, therefore, that if the debate is moved into the area of "consequences" of large numbers of women working in part-time employment then a whole new set of understandings begin to emerge. Firstly, the model shows that the "economic need" is extremely important to the understanding of the nature of part-time employment. Studies which focus on the "sexist assumptions" for employing women, as opposed to the economic need, tend either to play down the need or to imply that there is an element of suspicion surrounding the need. The approach taken here would argue that the function of part-time employment holds great economic value, both to the employer and the labour market in general. Part-time employment is also of immense value to the employee.

However, the model shows that the economic need is structured by sexist assumptions in the demand for suitable labour. As a result of this process, the economic value of part-time employment is denied. This denial is seen in the instances where employers play down the economic usefulness of part-time employment by referring to women (in their capacity as potential employees) as being "suitable" for part-time employment, rather than as being "skilled". In fact, the word "suitable" is an example of an abstracted term implying that the employee in question either has a "natural" or "given" aptitude for the job or that the job is suitable for the employee in that she has chosen to do the work. In both cases, the functional usefulness of the employment and its economic value to the employer and the market are denied. Thus, the model can be used to show that the conceptualisation of part-time employment in the demand for workers by employers is one which undervalues the skills it requires.

A second observation to be made concerns the circular nature of the model. It would appear from the focus on "consequences" that the process of the creation of part-time employment has become self-perpetuating. This realisation raises several questions. For example; how far does the conception of the "economic" by the employer build group traits - how far does the "abstract" presuppose its own concrete realisation? Is this a question of pre-selected part-time employment for women?

These questions are extremely important, especially if they are taken in conjunction with the knowledge that part-time employment is low paid. Do they imply the case of pre-selected low paid part-time employment for women? And, if they do, is this acceptable? If it is not to be considered acceptable, what can be done about it? Surely the existence of a vicious circle of collapsing supply and demand factors will pose difficulties for any attempt to regulate part-time employment. In short, there are important implications with regard to the form any regulation of part-time employment may take, in the light of the study made in this chapter.

Conclusions

This chapter focused on exploring the growth and nature of part-time employment. In order to do this effectively, the chapter looked at ideas raised by LMS theories and used these in conjunction with the ideas found in the debate on women's employment behaviour. An exploration of LMS theory was considered essential in establishing why employers choose particular and diverse employment structures. Additionally, an examination of the theories on women's labour market behaviour was crucial to the reaching of a full understanding of how "sexism" operated in the segmentation process.

A striking feature of part-time employment's characteristics was their apparent contradiction. On the one hand, part-time employment was low paid; it had, on the whole, a low level of employment protection; there was no career hierarchy; it had many entry ports. On the other hand, it was a stable employment; it had a stable labour supply; it required skill and, in many instances, firm-specific skill¹³⁷; in many parts of the service sector it was the core activity. It offered a medium/long-term solution to changes in the services sector. The main conclusion to be drawn from this is that part-time employment holds a primary function in its own right in the services sector, but for the many reasons highlighted above this is not reflected in the level of pay and protection accorded part-time employment. In short, part-time employment is undervalued by the process of "engendered segmentation".

I was concerned in particular with the consequences of the ghettoising of women in part-time employment and the effect this had on the nature (present and future) of part-time employment. As a result of this focus, a model describing the way in which "sexism" was involved in the construction of jobs and the demand for suitable workers was suggested. Two main observations were proposed: firstly, that the economic value of part-time employment was played down by the process of "engendered segmentation" and, secondly, that part-time

137 cf. op. cit. note 93: p75.

employment may be a "pre-selected" employment. Any regulation of it, therefore, will have to take on board both these phenomena.

In addition to the problem of under-evaluation revealed by the model of engendered segmentation, there were other problems which need to be considered in the course of the thesis in its analysis of possible legal strategies. These problems also stem from the fact that part-time employment is a segmented employment. As the chapter argued throughout, there are several features of segmented employment, which are important to any study of part-time employment. Two are of great importance: firstly, there is the question of socioeconomic mobility - certain groups of workers were concentrated in part-time employment with no socioeconomic movement into full-time employment, or, indeed, into other segments. Additionally, the flexibility required by the employer was achieved by the process of segmentation, which involved an inflexibility from the point of view of the worker. The problem highlighted here is thus concerned with finding a means for dismantling segmentation barriers to allow for free worker mobility.

The second important feature of part-time employment from the point of view of the thesis, is linked to the growing realisation that no segment of the labour market truly behaves as expected by neoclassical economics. In fact, all aspects of employment were found to be distorted in practice and artificially structured. It is important to realise, therefore, that the level of pay or social protection accorded to part-timers is not a "free" level equated to the actual economic value of the employment, but greatly depends on the structuring of "skill", which in turn is dependent on all the factors discussed above, eg. level of unionisation, sexist prejudice, supply of workers and so on. Ideal part-time employment policy would thus need to be based on an accommodation of such a theoretical analysis of part-time employment itself.

PART II

CHAPTER TWO - "SEXISM, SEGMENTATION AND SEX EQUALITY LAW"

Introduction

Through a study of Labour Market Segmentation (LMS) theory, it became apparent in Chapter One of the thesis that the growth of part-time employment for women was shaped by "sexism" operating in the labour market. The complex relationship of "sexism" to segmentation was explored in detail and the chapter highlighted the way in which "sexism" enabled a specific shaping of economic decisions made by employers in the construction of part-time employment, through the examination of the process of "engendered segmentation". The chapter finished by highlighting the need for legal strategies which would achieve a re-evaluation of part-time employment: "re-evaluation" was used as a specific term referring to according value which had been denied part-time employment as the result the process of "engendered segmentation". This chapter explores one of two legal strategies, which is through the application of Sex Equality Law (SEL) to the situation of part-time employment.

The study of this first strategy is compelled by three important factors. Firstly, one of the aims of SEL is that of tackling direct and indirect sex discrimination in the labour market¹. As the construction of part-time employment is influenced by sex discrimination/sexism operating in the market, logically SEL applies to such a situation.

The second two factors are UK-specific and result from a tendency in the UK to look to SEL as a means for establishing employment rights denied workers by a series of non-interventionist UK Governments. Firstly, SEL in fact constitutes the only legal option available

¹ cf. Carter, A. (1988): p139.

in the UK to part-timers making claims for a re-evaluation of any aspect of their working lives. This situation is in contrast to the situation in France, where part-timers have specific rights as part-timers under Public Statutory Law, in addition to the rights accorded them as women in employment. The specific laws regulating part-time employment in France will be considered in the next chapter.

Secondly, in the UK debate on SEL, there is a view taken by many that the European Court of Justice (ECJ), in its interpretation of both UK and EC SEL, has been progressive with regard to the issue of part-time workers' rights. It is argued that this is especially true, when one considers the lack of progress made by the EC Council of Ministers to grant part-timers any economic or social rights². Once again, this is argued in terms of the role of policy-making institutions versus the role of the Courts in granting rights to workers³. This view is based on the realisation that in some cases part-timers in the UK have benefited from SEL in acquiring rights which the UK Government persistently refuses to enact at EC level in the EC Council of Ministers and that this must be regarded as a success for SEL. This chapter does not disagree with this position. However, I intend to approach the question of part-time employment and SEL from a different angle and ask some other questions on this subject in relation to the issue of part-time employment in the UK. In particular, I wish to discover whether this first legal strategy is the best option for the re-evaluation of part-time employment.

The application of SEL to part-time employment is much discussed in the literature (located in the broader Sex Equality Debate) on both part-time employment and SEL⁴. The problems of applying the concepts of direct and indirect sex discrimination to part-time

² cf. Chapter Six of the thesis for a full discussion of attempts to grant part-timers rights at EC level.

³ cf. Hoskyns, C. (1986): Szyszczak, E. (1992): p125.

⁴ cf. Beechey, V. and Perkins, T. (1987): Blanchflower, D. and Corry, B. (1986): Elias, P. and Main, B (1982): Dex, S (1985): Prechal, S. and Burrows, N (1990).

employment are explored in a case by case study in Robinson and Wallace⁵. They highlight some specific legal problems such an application produces for the claimant herself and part-timers as a group. Beechey and Perkins also look at particular cases taken by part-timers using UK and EC SEL and reiterate the point made by Robinson and Wallace that the law has been limited in improving part-timers' general employment situation. In other writers, the discussion of the application of SEL to part-time employment arises through an analysis of the concept of indirect sex discrimination⁶. Cases taken by part-timers are explored as examples of difficulties connected with the operation of indirect sex discrimination. In the majority of these studies, the focus is on the legal interpretation of the statutory concepts of sex discrimination by looking at the case law.

This chapter aims to build on the findings made by such literature. The focus here, however, is not on individual cases taken by part-timers under SEL⁷. Instead, the chapter explores conceptualisations of the labour market made both by SEL itself and by the general critique of SEL. Parallels are drawn and distinctions made between these conceptualisations and the understandings reached in Chapter One of labour market functioning. This approach is conducted with the knowledge that many of the earlier understandings of the operation of SEL were made before LMS theory developed into its advanced form, as described towards the end of Chapter One.

In order to achieve its aims, Chapter Two is structured as follows: the first section explores the conceptualisation of the market by the law, through an examination of the structure of SEL. The second section then considers how the general critique of SEL understands the failure of law in relation to understandings made by the critique of market functioning. The final section considers how the position taken in Chapter One of the thesis

5 cf. Robinson, O. and Wallace, J. (1984).

6 cf. Gregory, J. (1987): Luckhaus, L. (1990): O'Donovan and Szyszczyk (1988): Prechal and Burrows (1990).

7 Examples of cases are given when relevant to later discussions on the regulation of part-time employment in Chapters Four and Five.

understands the failure of SEL in relation to its conceptualisation of the market. The examples of SEL given are those from UK public statutory law - reference to EC law is only made to emphasise similarities in places, but EC SEL as such is not under consideration here⁸.

Sex Equality Law

Sex Equality Law and the Market

UK SEL applies to both education and the labour market: here, I am concerned only with its application to the market. SEL has the potential to have an important impact on the dynamics of labour market structuring and also on the process of labour market segmentation as a whole. The crucial interest here, therefore, is how it conceptualises "sexism" and understands its relationship to the whole segmentation process. If its view of how "sexism" functions in the market is accurate, then its impact can be far-reaching. But, the previous chapter indicated that the relation of "sexism" to the operation of the market is not a simple one. Consequently, it is worth examining the rationale of the law to begin answering this question more fully.

In order to arrive at an understanding of how SEL conceptualises the labour market, I intend to consider the structure of the law and, in particular, the concepts of direct and indirect discrimination which it establishes. It will be seen that both these concepts of sex discrimination are built around three important structural aspects: the comparator test, the idea of "barrier" removal, with "sexism" operating as a barrier, and the "objective justification" test. Through an exploration of these features, it will be realised that they evoke certain understandings of the functioning of the labour market and especially the role played by "sexism" in its processes. In this manner, findings are established around two factors - the intention of the application of SEL to the market and the conceptualisation of the market by SEL.

⁸ Article 119 of the EEC Treaty is only reviewed in the thesis as part of Social Policy in general. cf. Introduction.

Direct Discrimination

The concept of direct discrimination is conferred the following definitions by the UK laws. Section 1(1)(a) of the Sex Discrimination Act clearly defines direct (or overt) discrimination in the following manner. A woman is believed to have been discriminated against if...

1(1)(a) on the ground of her sex he [refers to "a person"] treats her less favourably than he treats or would treat a man.⁹

According to the Sex Discrimination Act, direct sex discrimination deals with a singular set-up wherein one individual must show that she has been treated less favourably than another is treated, or would be treated, in an outwardly similar situation because of her sex (or marital status). This means that, firstly, the individual woman must have a man with whom to make a comparison and, secondly, that she must be in a similar situation to the man with whom she is making the comparison: if an actual male comparator does not exist, the acceptance of a hypothetical one by the courts is necessary.

The Equal Pay Act is similarly structured around this formulation. This Act operates in effect by inserting an "equality clause" into the terms of an employment contract, if there is shown to be a variation between a woman's contract and a man's contract, under certain limited conditions. In its original form, these conditions are described in this way: firstly, where the woman is employed on like work with a man in the same employment, and secondly, where the woman is employed on work rated as equivalent with that of a man in the same employment. Definitions of what constitutes "like work" and "work rated as equivalent" are also provided by the Act. "Like work" is described as work which is "*of the same or a broadly similar nature*". "Work rated as equivalent" refers only to work which has been subject to an equal value test under a job evaluation system. Under the Equal Pay Act, therefore, the male comparator must actually exist. Either he must be employed on like work in the same employment, or he must be employed on work rated as equivalent in the same employment.

⁹ The law recognises that discrimination can occur on the grounds of marital status as well.

Indirect Discrimination

As with direct discrimination, it is the Sex Discrimination Act which provides us with the most detailed definition of indirect (or covert) discrimination. Indirect discrimination is defined in section 1(1)(b) of the Act: a woman has been indirectly discriminated against if ...

1(1)(b) he [refers to "a person"] applies to her a requirement or condition which he applies or would apply equally to a man but - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it.¹⁰

Indirect sex discrimination deals with the effect or impact a particular act or practice, which may in itself be fair and just, has on an individual or a group of individuals, where that effect is unequal in scope. Byre¹¹ notates the procedure which will have to be followed to prove a case of indirect discrimination under section 1(1)(b) of the SDA:

The person alleging such discrimination will need first to prove the existence and application of a particular requirement or condition which is or would be applied equally to men and women; then to show that the proportion of women who can comply with it is considerably smaller than the proportion of men able to comply; and then to demonstrate that she has suffered detriment because of her inability to comply with the requirement/condition.¹²

Byre argues that the alleged discriminator's intention is irrelevant to proving a case of indirect discrimination: the main criterion is the effect of a requirement or condition (though the awarding of compensation may be affected by intention)¹³.

Although the Equal Pay Act appears to be aimed at dealing with cases of direct pay discrimination, it was in fact amended in 1983 to include a third condition, which can arguably be regarded as an attempt at reaching instances of indirect discrimination in the area of pay. According to the third condition, an "equality clause" may be inserted into the terms of an employment contract, if there is shown to be a variation between a woman's contract and a man's contract, where a woman is found to be employed on work which is of equal

10 The Act is also concerned with the elimination of discrimination on the ground of marriage - both forms of discrimination, direct and indirect, are applied here as well.

11 cf. Byre, A (1987): p13.

12 *ibid.*: p13.

13 *ibid.*: p15.

value to that of a man in the same employment. This later amendment to establish the broader condition of "equal work for equal value", in accordance with Article 119 EEC Treaty¹⁴, operates by rule to a different set of guidelines. If a claim is being made according to this principle, the case for establishing work of equal value is put in the hands of an appointed independent expert. It is up to the independent expert to work out how to establish "equal value". As with cases of direct discrimination, a male comparator must exist, but there is some flexibility allowed here in that the comparator, or indeed comparators, need not be employed in the same work and his work does not have to have been evaluated by a job evaluation scheme. (It is to be noted briefly that EC SEL also operates on the basis of the application of the concepts of direct and indirect discrimination. This chapter is not concerned here with considering the type of market it is applying itself to, but as the application of EC law is relevant in later chapters, it is important to note here that its structure is very similar to that of UK law).

Direct and Indirect Discrimination: Comparisons¹⁵

Direct sex discrimination conceptualises "sexism" existing in the market in the form of sex-based assumptions held by employers. Such assumptions are overt and result in unfavourable treatment. They prevent women from "getting what men get" at work and, in this manner, they exist as sex-based barriers. Direct sex discrimination legislation is all about the location and removal of these barriers.

Indirect sex discrimination conceptualises "sexism" in a potentially more sophisticated fashion. "Sexism" exists in the labour market in the form of requirements or conditions which appear as neutral barriers. The concept of indirect sex discrimination locates "sexism" in the effect that such requirements have on workers, as groups and as individuals. This notion is conceptually more promising than direct discrimination, in that it is apparently able to deal

¹⁴ cf. Article 119 EEC Treaty: this is Basic Community law. This Article will be discussed in more detail in Chapter 7 of the thesis.

¹⁵ For a full discussion on "equality talk" and the concepts of sex discrimination, cf. Brown, B. (1993).

with effects of past discrimination, institutionalised discrimination and substantial inequalities existing in the market. In this manner, indirect sex discrimination potentially moves into the realm of consequentialism, focusing on consequences of barriers. This potential is, however, limited by two key factors, which indirect discrimination holds in common with the concept of direct discrimination. Firstly, indirect discrimination is about the location and removal of barriers which prevent women from getting what men get at work. Secondly, it may be justified according to the "objective justification" test. Let us explore these limitations further and look again at the concepts of direct and indirect discrimination under three separate headings: the comparator test, barrier removal and the objective justification test.

The Comparator Test

Like direct discrimination, indirect discrimination requires a comparator of some description. Moreover, from the definitions of sex discrimination, an equality clause and the principle of equal pay for equal value (given by the SDA and the EqPA respectively), it is clear that the availability of a satisfactory male comparator, real or hypothetical, or a comparable group of men, is fundamental to proving a case. A man or men is the standard and this male standard is the starting point for the operation of the law. Once the male standard is understood and described, the law then states that the standard is to be applied to all workers, without distortion by "sexism". This is key to the understanding of the functioning of the market by SEL, because each time the law argues for the application of the standard without distortion by "sexism", it has already assumed that the standard exists as an example of undistorted economic functioning, ie. that existing market practices in relation to male employment behaviour represent the model of undistorted economic functioning. SEL thus conceptualises market practices with regard to male employment behaviour as examples of free and undistorted labour market functioning.

Barrier Removal

Once the law has located the "barrier", the subsequent procedure adopted will depend on whether the concept of direct or indirect sex discrimination is being applied. With regard

to the former, it must be decided whether the barrier is indeed sex-based - which is equated with motive - or whether it exists for some other reason. If it is found to be sex-based, then the law's aim is to remove it. With regard to indirect discrimination, it must first be decided whether the barrier in question is having an effect which in fact discriminates against the individual in question. If it is decided that this apparently neutral barrier is having such an effect, then a decision must be reached on whether to remove it.

Unlike under direct discrimination, under indirect discrimination the barrier, if found to be detrimental, is not automatically removed. Instead, a further question is asked about the requirement for the barrier. If it is found that the barrier can be objectively justified for reasons unrelated to "sexism", then the barrier may be allowed to remain. Accordingly, therefore, even though indirect discrimination may appear to focus solely on the effect of neutral barriers, the "objective justification" test forces the law further back to looking at reasons for the barrier. This means that even though indirect discrimination recognises the problem as one of consequences, it still uses cause-dependent conceptions. In this manner, it never breaks completely away from the sources' doctrine which in fact is dominant in the last instance. Ultimately, therefore, it is in the notion of the justification where indirect discrimination locates distorting "sexist" practices operating within market processes.

It can be deduced from its envisaged operation of both direct and indirect discrimination that the law conceptualises these barriers as being initially caused by factors which are external to the market place. For example, direct discrimination locates sexist assumptions or ideological factors as reasons for barriers. In indirect discrimination, the aim is perhaps more to reduce the effect of institutionalised sexism within the market but, again, the law assumes the possibility of knowing that a barrier amounts to institutionalised sexism by looking at the reason for the barrier. The whole notion of barrier removal thus indicates a specific understanding of how "sexism" distorts free market functioning. "Sexism" is seen to exist at the level of ideas, as a force which is outside the labour market and which enters into

the market and distorts the otherwise fair application of market rules. The explanation for its existence would thus seem to be external to the supply and demand circle.

In this way, a tension exists for the law between sexist distortion on the one hand and undistorted economic practices on the other. This tension arises from the focus of SEL on the causes rather than the consequences of barriers. This is clearly visible in the operation of direct discrimination and less so in the operation of indirect discrimination. For, although the concept of indirect discrimination potentially looks at effects or consequences of labour market structuring, at the last moment it shifts its focus onto the causes of such structures, thus establishing the tension. Consequently, the tension is most marked in the application of the "objective justification" test.

The Objective Justification Test

As is seen above, under both direct and indirect sex discrimination, the question is asked whether there are other reasons for the discrimination, which are unrelated to sex. This question allows the employer a defence against the claim that sex discrimination has occurred and will, from now on, be referred to as the "objective justification" defence allowed to the employer - this term is usually only used by reference to indirect discrimination, but I intend to use it here to indicate the examination of the causes, rather than the consequences, of discrimination. This is common to all areas of law mentioned above. Under the SDA, direct discrimination may be discrimination for reasons other than sex and indirect discrimination may be "justifiable" on grounds other than sex. A difference in pay may be argued to be based on a "genuine material difference" or "material factor" other than sex under the EqPA¹⁶.

The "objective justification" test is all about asking the following: what is the reason for the barrier in question? Is it based on "sexist assumptions" or is it in reality justified by

¹⁶ cf. Section 1(3) of the EqPA. The development of the "objective justification" test by the ECJ underpins its treatment of cases involving claims of indirect discrimination under A119 and allows for difference in treatment of workers for economic or other reasons. cf. *Bilka-Kaufhaus GmbH v Karin Weber Von Hartz* (Case 170/84) ECJ (1986): ECR 1607.

neutral economic factors? This question has already been noted in Chapter One within the debate on women's labour market behaviour on the causes of part-time employment for women. There, it was argued that this question was in fact structured around a false opposition, which believes that it is possible to separate economic factors from sexist assumptions in the decisions made by employers with regard to the structuring of part-time employment. I would argue, therefore, that the "objective justification" test is also structured around this false opposition. Accordingly, SEL can be assuming as its purpose the locating and isolating of "sexist practices" as opposed to justifiable "economic practices"¹⁷.

Summary

From the above analysis of the three main structural aspects of SEL, a consistent conceptualisation of labour market functioning as understood by the law can be formulated. This conceptualisation views the market as an essentially free and fair area, whose freedom and fairness are being distorted by external "sexist" practices. Such a picture arises from the focus of the law on the causes rather than the consequences of barriers. Furthermore, it is argued that the problems surrounding SEL are precisely those identified in Chapter One of the thesis in the form of a false opposition. This opposition is one which weighs distorting sexist practices against undistorted economic needs and attempts some meaningful separation of the two parts. It was argued in Chapter One that, according to advanced labour market segmentation theory, no such separation is meaningful. Moreover, SEL reveals its own weakness in this regard by upholding economic practices with regard to male employment behaviour as paradigms of undistorted economic functioning. Before going on to criticise such an approach from this angle, I intend first to examine the main ideas contained in the body of critique of SEL.

¹⁷ Examples of the operation of the objective justification test in cases taken by part-timers are given in Chapters Four and Five of the thesis.

Critique of "Sex Equality Law"

This section will explore how the critique of SEL understands the failure of the law in relation to the critique's understanding of the market. For this purpose, I have divided the critique into three parts: each part has its own understanding of the failure of SEL and its own conceptualisation of the market. In general, the critiques argue that SEL fails because of the Law's inability to address market problems. But, the critiques in fact offer three somewhat different notions of the "market problem". In this way, SEL apparently fails in its application to three different market models. In addition to this, the critiques themselves in places compound and perpetrate the assumptions made by SEL on the functioning of the labour market, thus adding to the complexity of the arguments.

Critique Number One - A Sexism-Distortion Model of Legal Functioning

This critique does not have a problem with the legal understanding of how "sexism" relates to the market. Indeed, seeing "sexism" as an external force, distorting the free functioning of the market, it conceives of "sexism" as distorting the opportunity for women to compete with men on an equal basis, or as a distortion of otherwise neutral practices. In this way, it can be seen to accept the position taken by SEL in its understanding of the relationship of "sexism" to the labour market.

Accepting the SEL definition of the problem, this critique also follows the law's vision of the solution. "Sexism" is to be stamped out: this will be achieved by giving individuals rights against discriminatory practices. SEL has the potential to fulfil its aims and become a powerful instrument for victims of sex discrimination. In order for this aim to be fully realised, judges have to interpret key words as widely as possible¹⁸, and it is even suggested by this critique at one point that judges should rule in favour of alleged "victims"¹⁹. In short,

18 cf. O'Donovan and Szyszczak (1988): p112.

19 cf. op. cit. note 20: p151.

this critique does not question the basis on which SEL stands: the law is neutral and the norms and standards it utilises are understood to be objective.

However, the law is seen to be failing in its aims, and its potentials are not being realised. This critique explains the failure by arguing that the law is not being applied in an objective manner: the application of the law is understood to be "sexist". Here, it can be seen that the critique extends its understanding of "sexism" as distorting fair market practices to the understanding of "sexism" as distorting the fair application of law. Courts, tribunals and judges (and politicians) are seen to be unsympathetic to the aims of the law and "sexism" comes in at this level, apparent in the "false assumptions" or "ideas" about women which these bodies make.

The critique understands the failure of SEL in terms which are similar to those employed by the debate on women's market behaviour as shown in the Chapter One of this thesis. It is to be remembered that Chapter One highlighted an opposition in the debate which sought to make distinctions between "false" assumptions as opposed to "true" assumptions made about women in their capacity as potential workers. Here, the critique is concerned with pointing to "false" assumptions made by judges about women. It takes the view that these "false assumptions" or "ideas" about women are distorting the objective application of the law. In other words, those persons who sit on employment tribunals, or in the courts, are guilty of either completely distorting the application of the law or, at the very least, of preventing the full potential of the law to be realised. Consequently, this critique points to "good" or "bad" judgments, judges or courts. Summarily, although the law as such is not criticised, this critique argues that it cannot address the "market problem" because judges behave like employers.

Jeanne Gregory's work is a good example of this kind of critique²⁰. Her book examines in depth the interpretations of SEL by the British courts and tribunals. She understands the equality legislation to have as its purpose the desire to combat sex discrimination. She argues that in its present form it reflects a tension between the rights of victims and the rights of employers. She argues further that...

*wherever the tribunals and courts have resolved this tension in favour of the employers, they have thwarted the primary purpose of the legislation.*²¹

Throughout she makes references to inconsistencies between judgments and is keen to show where tribunals and courts are "out of step with the fundamental aims of the equality laws"²². Inconsistencies themselves are attributed to the relative "sympathy" of the body in question with the aim of the law. Eg.

*The EAT's approach varied considerably, depending on whether or not the judge presiding in the case was sympathetic to the aims of the legislation.*²³

Certain judges are named as being "sympathetic", for example, Mr. Justice Browne-Wilkinson. Her argument points to "tantalizing glimpses" of the potential impact of indirect discrimination, if only the law were being applied more positively.

She does acknowledge that the words used by the law do not make a case easy to prove and could, on the whole, have been better chosen, ie. the use of the word "necessary", instead of "justifiable", would have offered less scope for interpretation by the judges. This point is explained away, however, by the critique itself: the words were deliberately chosen in order to minimise the impact of the judgments, ie. by unsympathetic politicians who are keen to preserve the power of the employers by allowing for the potential "misapplication"

20 cf. Gregory, J. (1987). The arguments in her book falls into both critique no.1 and critique no.2 categories.

21 *ibid.*: p151.

22 *ibid.*: p151.

23 *ibid.*: p43.

of the law²⁴. This being said, Gregory places the "real" blame for misapplication on the heads of the judges, rather than the politicians. This is best seen in a piece supporting the views held by Griffith:

*Many of the legislative amendments proposed by the Commissions would not be required if the judiciary had responded more sympathetically to the aims of the legislation, or had followed the lead set by the small number of more "enlightened" judges.²⁵
At the end of the day, the understanding and attitudes of the people who adjudicate is more important than devising a new form of words.²⁶*

O'Donovan and Szyszczak also pursue this kind of critique at moments throughout their book on SEL, although their main argument really belongs to the second critique which is examined later²⁷. The first type of critique is at its most poignant in their study of the interpretation of the concept of indirect discrimination by the courts/tribunals²⁸. The core of this argument is that the focus of the tribunals has been away from the effect of indirect discrimination and onto the economic justifications given by the employers. The weight given to economic "justifications" is held as being indicative of the misapplication of SEL. Let us consider some examples.

O'Donovan and Szyszczak consider in detail the interpretations of the various key words involved in the proving of a case of indirect discrimination. They argue that whereas the EAT has not taken a narrow approach in its interpretation of a "requirement or condition", all of the other key words pose great problems for the claimant. The words "can comply" have been subjected to restrictive interpretation: unresolved questions surround the proof of "detriment": on the establishment of what constitutes a comparable pool of men, Home Office

24 Another example of this is the history of the interpretation of the "material factor". This concerns men as politicians: "Lord Denning [in *Fletcher*] acknowledged that if the "market forces" argument is accepted as a valid reason for not awarding equal pay, the fundamental aim of the law is thwarted". This is an example of a Judge, labelled by the critique as unsympathetic, being more sympathetic than very unsympathetic (male) politicians. cf. op. cit. note 20: p23-24.

25 cf. op. cit. note 20: p150.

26 cf. op. cit. note 20: p151.

27 cf. op. cit. note 18.

28 *ibid.*: p99 et seq..

guidelines are unhelpful and there has been a tendency for the tribunals to rely on "common sense" rather than empirical evidence: "common sense" lays itself wide open to subjective interpretation.

The main problems, however, are found in the interpretations of "justifiable": they argue that a subjective approach²⁹ has been taken in the interpretation of this word. This word has been watered down from its initial understanding as a "need"³⁰, to "reasonable commercial necessity"³¹, to "right thinking people" and finally to a test of whether the requirement is "reasonable" or not³². The great weight given to the economic requirement by the courts can thus be seen. O'Donovan and Szyszczak explain this factor by reference to "false assumptions" about women:

*The legal discourse surrounding the operation of the indirect discrimination provisions recognizes the goal of accommodating difference into the concept of equality of opportunity, but that discourse is limited through... a judicial reluctance to widen the ambit of the debate over equality.*³³

O'Donovan and Szyszczak argue that a reliance on "common sense" by tribunals can "*mask discriminatory perceptions of the role of women in society*"³⁴. Examples of such discriminatory perceptions distorting the fair application of the law are given by reference to Kidd and Holmes. The judicial reluctance referred to above is earlier described as "*preconceived judicial ideas of the way society is organised*"³⁵.

29 *ibid.*: p111.

30 *cf.* *Steel v Union of Post Office Workers* (1977) IRLR 288 at 291.

31 *cf.* *Singh v Rowntree MacIntosh* (1979) ICR 554.

32 *cf.* *Ojutiku v Manpower Services Commission* (1982) ICR 661 at pp667-8.

33 *cf.* *op. cit.* note 18: p115.

34 *ibid.*: p106.

35 *ibid.*: p115.

(The ECJ also takes its share of the blame for the failure of SEL. O'Donovan and Szyszczak in fact argue that the "*over-reaching economic considerations*"³⁶ of the European Community's Sex Equality Policy can be found in the way the ECJ has approached the interpretation of the concept of indirect discrimination. Ellis in her book on European Sex Equality Law, also points to the weakness of Community law by reference to the weight given to economic "need"³⁷ over the right for equality, she considers failure in terms of the second critique to be the more important failure. I would argue that this placing of emphasis on the economic by the ECJ is not altogether surprising, given the fact that the EEC Treaty is all about the establishment of an Economic Community. It is, in fact, more surprising the other way round and, indeed, other writers point to a liberal approach taken by the ECJ³⁸).

Summarily, the critique is keen to attribute the failure of SEL first and foremost to the misapplication of the law by judges and tribunals. In particular, the failure of the "objective justification" test to locate indirect sex discrimination is understood by reference to interpretations of what is considered "justifiable", which place an emphasis on employers' organisational and economic requirements, rather than on the protection of workers against sex discrimination. There is no questioning of the structure of law made by this critique.

The first Critique thus sees SEL in terms of a sexism-distortion model of undistorted legal functioning - "sexism" operates once more at the level of ideas and exists in the form of "false assumptions" made by judges/politicians about women. The assumptions then distort the otherwise fair application of the law. The difficulty with this understanding, from the point of view of this chapter, is that it endorses the basis on which SEL is founded (ie. the first

36 *ibid.*: p209.

37 This is her word. cf. Ellis, E. (1991): p206.

38 cf. Luckhaus, L (1990): p18. The view that the weight placed on the economic by the ECJ is not surprising, is based on the fact that the EEC Treaty has as its primary objective the establishment of an economic area. This argument will be explored at length in Part III of the thesis, but I will touch on it here briefly. Basically, this argument understands that Article 119 is concerned first and foremost with an economic goal it is a social measure for economic objectives. It upholds harmonisation in the area of equal pay between men and women in order to prevent distortions of competition in a free market. The argument in Chapter 7, is that the perceived social objective of Article 119 can only be realised if, after the law has been enacted, the market then functions in such a way as to reproduce equality.

false opposition) and then proceeds to criticise the law's application on the basis of how that false opposition is played out in practice (ie. the second false opposition). I understand there to be a causal relation between the two oppositions, whereas the critique attempts to separate the first opposition in its endorsement of the law from the second opposition in its criticism of the failure of law. This contradiction thus compounds the level of arguments and understandings.

Critique Number Two - A Sexism-Distortion Model of Market Access

The second critique primarily differs from the first critique in that it does not agree with the way that SEL has understood the "problem". This critique's view is based on the understanding that men and women are not the same: they do not come to the market place in the same way. Instead, it is argued, men and women have different and unequal starting points which are not recognised by the law.

Nevertheless, sexist distortion is still conceptualised as a barrier. But, here, "sexism" is seen to exist as "hidden barriers" to entry: it is conceived of as "barriers" to entry into the market or into certain groups/jobs within the market. So, the "problem" is conceptualised as an entry or access problem. How this critique believes this to be occurring is in keeping with some of the theories discussed in Chapter One and, in particular, with the model which Barron and Norris establish³⁹. As a result, it is ambiguous whether market functioning itself is identified as a real problem.

Analogy with the second opposition contained in the debate on women's labour market behaviour in the first chapter, which weighs "true" versus "false" assumptions, is less clear cut, but can nevertheless be made. In contrast to the first critique, this critique focuses on that part of the opposition which is concerned with "true assumptions" about women. It will be recalled that the arguments dealing with "true assumptions" about women all

39 cf. Chapter One.

considered the following question: why are these assumptions true? The answer given to this question was the following: assumptions are true due to institutionalised sexism, which exists for example in the division of domestic labour. The acknowledgment that institutionalised sexism is an issue for SEL can be seen to be worked into the framework of the second critique.

This critique argues that SEL is ineffectual at dealing with "sexism" because it does not extend itself to the areas where sexism "really" exists. SEL, it argues, has not fully understood the way society is structured and attempts only to apply a likeness or comparative test to essentially unlike situations. Moreover, this critique argues that the aim of SEL, which is to promote equal opportunity, will not be realised because of the unequal starting point which men and women have. The law's failure is therefore located within the text of the law itself - the law contradicts itself. As it stands, the law cannot operate in such a way as to alter the substantial inequalities which exist between men and women: it can never achieve its own goal. As Brown⁴⁰ argues, according to this critique, SEL would only work to produce its outcome in a situation where the starting point is already equalised and in this situation it would be redundant. Summarily, the way society is structured and the way the text of the law is structured together explain the failure of SEL.

Inherent in this critique is a critique of formal justice. Part of the debate that formal justice does not (and cannot) pursue a policy of equality of outcome can be found in this critique. According to this position, the comparator test prevents this legislation from achieving the "real end" of equality, which is understood in terms of a pluralistic vision of a broader goal of social or redistributive justice⁴¹. The assimilationist model is viewed as an end in itself, as opposed to a means to an end. Ultimately, this critique becomes mixed up with a general critique of the whole notion of individual rights' theory⁴².

40 cf. op. cit. note 15.

41 cf. op. cit. note 18: p43.

42 cf. Thornton, M. (1991): pp453-469.

One of the main features of the critique, therefore, is its attack on the notion of the likeness test. This attack is mainly aimed at direct discrimination, although the principle of comparing like-to-like in indirect discrimination cases is also under attack. In the main, though, indirect discrimination is considered to be a potential solution to the law's failure, as this mechanism can be used in order to reach substantial inequalities, effects of past discrimination and even institutional discrimination. Unfortunately, it is realised that the concept of indirect sex discrimination is not being used to its full potential⁴³.

Let us explore some examples of this critique. The main tension located by the second critique in relation to the notion of equality generally is neatly described by O'Donovan and Szyszczak in the following way:

*this question of whether equality is viewed as competition between women and men starting from the same point, or as a pluralistic recognition of different qualities and needs, is fundamental to theories of sex equality.*⁴⁴

The law, it is argued, supports the former of these two positions⁴⁵, whereas the critique contains a plea for the latter:

*Qualities intrinsically related to femaleness may continue to be a barrier to equal treatment as they cannot form the basis of a complaint under the SDA, because no comparison is possible.*⁴⁶

The law fails because it treats men and women as if they were starting from the same point and as if they were the same, whereas in fact men and women start from different points and are not the same. Ellis provides us with a succinct example of the main thrust of this critique. She argues that EC Equality law offers women the chance to behave like men and seek male opportunities...

*But this, by very definition, could never work successfully until such time as the underlying patterns of organization of our society had changed.*⁴⁷

⁴³ The critique understands this failure in the terms of the first critique.

⁴⁴ cf. op. cit. note 18: p7.

⁴⁵ "Stuck in its comparative mode the legislation is concerned to open up the labour market to new competitors, but on current terms". cf. op. cit. note 18: p47.

⁴⁶ cf. op. cit. note 18: p42.

⁴⁷ cf. op. cit. note 37: p207. My emphasis.

These underlying patterns refer to such phenomena as the family division of labour. Her argument is that SEL does not tackle the "roots" of inequality. Her solution is to extend the law into other areas, in order to dismantle structural inequalities through law. These areas include paternity leave, education and positive action for women.

Similarly, the conclusion given by McCrudden in a collection of essays on SEL provides us with many examples of this position. Szyszczak, Rubenstein, Atkins and Luckhaus all call for the dismantling of sexist structures. Szyszczak is quoted here as arguing that *"unless legislation attempting to reduce the inequalities also recognizes that the participation of women in the labour market is limited due to child-bearing and child-rearing"⁴⁸*, the law will not completely eradicate pay inequalities. Earlier on in the book, Atkins and Luckhaus write on the EC Social Security Directive and UK law⁴⁹. Here they perceive the breadwinner and dependent model of social security entitlement as an example of a so-called neutral structure, which acts as a (hidden) barrier to equal treatment under these laws. Indirect discrimination is seen as a potential solution, but arguments used under the heading of "the first critique" are used here to explain the restrictive view adopted by the ECJ.

Summarily, the second critique focuses on the failure of law to understand the manner in which men and women supply their labour to the market. This is seen in the attention paid by the critique to exploring the existence of "social" structures which prevent women from behaving like men in the market place. It is then shown how the law in its present form is not able to dismantle such barriers. The law fails because it does not begin to tackle the origins of labour market inequalities, which are found in the "hidden" barriers to entry, ie. in the social structures⁵⁰.

48 cf. McCrudden, C. (1987): p186.

49 *ibid.*: p121.

50 Such barriers might be enabling conditions to market entry, eg. socialisation, education etc., as well as the family division of labour.

The second critique, operating as it does within the constraints of the second false opposition, explores the reason why "sexist assumptions" made about women are based on true institutionalised "sexism". This forces the critique to concentrate on the question of the supply of labour. The interest of this critique from the point of view of this chapter is the way in which the critique might understand the relationship between the market and the "social" structures, ie. the relationship between the demand for and supply of labour. This particular question will be explored in more detail in the last section of this chapter.

Critique Number Three - A Model of Structured "Sexism"

The third critique is different in its approach in that the criticism of SEL is part of a wider understanding of "society" and the way in which all aspects of life are organised. This critique believes that we live in a society which is structured in terms of power and gender. We live in a situation of male supremacy, with men holding power, and female subordination, with women, as a group, being less powerful and economically poorer and also, as a group, being subjected to a large amount of physical and sexual violence and abuse (predominantly by men). This situation, it is argued, defines the standards - the so-called "normal standards" - used by law. The standards are structured according to the "rules" of the unequal society. Consequently, "sexism" is no longer seen to be operating as a separate and identifiable external force distorting the market (or the law): it is already structured into the "normal" operations of employers, for example, or into the "normal" procedure for pension entitlement. "Sexism" cannot be teased out from such things as job "skill". Moreover, sexist distortions are not mistakes in an otherwise free system: they are important components of a system of inequality, without which the system would collapse. Sexist practices are designed practices.

The critique of SEL is straightforward. The law is not a neutral instrument. SEL does not tackle "sexism": it is blind to it. The law uses structured and subjective standards as if they were neutral or objective standards. This is most apparent in the likeness test, where "male behaviour" or the "male job" is the norm, ie. is presented as an objective standard. In applying structured standards to a situation as described above, ie. to a situation which is unequal in

terms of power, money and body integrity, the law entrenches male supremacy. But this is not all. In upholding structured standards as objective criteria, the law perpetuates and exacerbates the situation. The law is not seen as an instrument of change to the advantage of women. Its standards are seen as resulting in a predictive outcome: the maintaining of the system. But worse is the illusion of change which these laws embody.

The best example of this position is found in MacKinnon⁵¹. Her theory amounts to a critique, not only of SEL, but also of what she terms the whole "difference approach"⁵². The doctrine of "sex equality", she argues, is one which contradicts itself:

*a built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference.*⁵³

It is possible to discern within this doctrine the two paths located, in particular, by the second critique: be the same as men (the comparator test) and/or be different from men (the idea of special treatment for women, eg. positive action). MacKinnon's point is that to take this approach to sex equality issues is to take "*a particular approach*". She calls this the "difference approach". MacKinnon goes on to argue that hidden within this approach to "sex equality" is the fact that "men" or "maleness" is the referent: the woman is either the same as the man, or she is different from the man. The difference approach does not embody a concept of equality which operates beyond this male standard: in all cases the referent is male. She argues further that...

*Approaching sex discrimination in this way - as if sex questions are difference questions and equality questions are sameness questions - provides two ways for the law to hold women to a male standard and call that sex equality.*⁵⁴

The "obvious" male comparator test is just the first in a long line of less obviously structured standards. MacKinnon's essay provides the reader with many examples of so-called abstract standards used by law, which are in fact standards structured either in male terms or in

51 cf. MacKinnon, C. (1987).

52 *ibid.*: p34.

53 *ibid.*: p33.

54 *ibid.*: p34.

accordance with male behaviour/male power. For example, in referring to divorce laws she states the following:

Men often look like better "parents" under gender-neutral rules like level of income and presence of nuclear family, because men make more money and [as they say] initiate the building of family units.⁵⁵

Or, with regard to employment, for example:

socially defined biographies define workplace expectations and successful career patterns.⁵⁶

In sum, the qualities which men hold and which distinguish them from women are "otherwise known as the structure and values of American society⁵⁷". MacKinnon argues that men and women are equally different one from the other, but society does not recognise these differences as being equal. Society considers men's differences as the values and structures of society. The difference approach does not challenge this consideration. Through its application of the sameness and difference tests, whose philosophy reflects male dominance, it entrenches this fundamental inequality in the guise of equality. MacKinnon's main argument here is that concealed beneath the general and abstracted legal standards (which are considered to be gender neutral) is an actual situation of deep social inequality, which is left untouched by the law and consecrated within it.

MacKinnon proposes an alternative approach which moves beyond this "trap". She calls this the "dominance approach". This approach understands both gender and equality to be questions of power. In looking at society from this perspective, it is possible to expose the great extent of sex segregation of poverty and violence against women. It is also possible to see clearly the effects of long-term male supremacy. It voices whole aspects of women's lives which the difference approach cannot even pronounce, precisely because these things are unique to women. This approach is a political one:

If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals... But if gender

55 *ibid.*: p35.

56 *ibid.*: p36.

57 *ibid.*: p36.

*is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex equality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.*⁵⁸

For Mackinnon, there is no hope for law structured in this way. The law fails because it conceptualises society incorrectly; *"the mainstream law of equality assumes that society is already fundamentally equal"*⁵⁹.

Sex Equality Law and Segmentation

In the final section of this chapter, I intend to explore my own understanding of the failure of SEL in relation to the understanding of labour market functioning as presented in Chapter One of the thesis. This will be done by re-exploring some of the ideas raised by the general critique of SEL in respect of their understandings of the relationship between SEL and market - it was seen in the above description that there are three models of market functioning in evidence. The aim is to argue that SEL ultimately fails in its application of the concepts of direct and indirect sex discrimination because it does not take on board the labour market segmentation process, of which "sexism" is a component part⁶⁰. This is particularly poignant when considering the demand for labour and the model of "engendered segmentation", first presented in Chapter One.

An application of the understandings of LMS theory (in their most developed form) to the structural aspects of SEL leads to the following comprehension of the failure of SEL. Firstly, an LMS position would find the assumption made by the comparator test, that male market practices represent a model of undistorted economic functioning, a highly problematic belief. To the contrary, one of the chief arguments made by LMS theory is that the process of segmentation means that (white) male employment behaviour is itself an example of distorted

58 *ibid.*: p42.

59 *cf.* MacKinnon [1989]: P234.

60 Examples of such difficulties are not presented here, but are described where appropriate in the following chapters of the thesis.

economic practices - this is seen clearly in the findings of the early dual labour market theory with regard to internal labour market behaviour of certain groups of (white) male workers. At this very fundamental level, therefore, LMS theory is at odds with SEL.

Secondly, LMS theory, in its most advanced form, does not agree with the understanding made by SEL on the construction of the "barrier", which SEL seeks to remove. How LMS theory understands the construction of labour market segmentation barriers is explored at length in Chapter One. Summarily, LMS theory understands that labour market segmentation is a process which comes about through the collapse of supply and demand factors. As a process, it issues forth segmentation barriers which are seen to exist within firms and between employment types - a barrier would be perceived between full- and part-time employment, for example. Moreover, "sexism" is seen to be involved in this process, ie. "sexism" is internal to labour market practices - labour markets are seen to reproduce discrimination (sex and race). Chapter One describes and presents models of this process and it can be seen from these that "sexism" does not merely exist at the level of ideas, nor is it external to the supply and demand question. In this manner, the previous chapter located a process of what I have called "engendered segmentation". Here again, therefore, the conceptualisation of the relationship of "sexism" to the market made by LMS theory is seen to differ with that of the same made by SEL.

Finally, the position taken by Chapter One of the thesis is one which focuses on consequences of labour market structuring, rather than on causes. This particular angle is one adopted specifically by the chapter, rather than by LMS theory as such, but nevertheless springs from understandings made by LMS theory on the relationship between supply and demand factors. This focus would argue that the "objective justification" test is structured around a false opposition which understands sexist distorting practices to be opposed to undistorted economic practices. In Chapter One, it is argued that the economic reasons for low pay of part-timers, for example, are already structured by the abstracted assumption made by the employer on women's past employment behaviour. In other words, the sex discrimination

element is already present, but hidden, in the objective justification firstly, in the decision to choose part-time employment and secondly, in the demand for "suitable" workers. In other words, economic needs are not of themselves neutral, but are structured by gender elements. SEL does not make such an assumption. Instead, the "objective justification" test assumes that economic reasons can be found and separated out from sexist assumptions or prejudices made by employers, intentionally or otherwise. As is demonstrated through the descriptions of the collapses of supply and demand factors given in the previous chapter, this belief is highly disputable.

This understanding of the failure of SEL can be further backed up by the critique of SEL, as described, above, in both an indirect and a direct manner. In the overview of the second critique above, it is hinted that one of the interests of this critique is the way in which it conceptualises the relationship between "social" structures and market structures. An exploration of how it makes such connections will be considered here now, as this holds implications for the arguments being made by this chapter. Additionally, these arguments, in particular with regard to the way in which SEL understands the structuring of the demand for labour, will be seen to align themselves with the ideal stance taken by the third critique in its understanding of the structuring of the standard.

In the examples given in the second section above, the second critique appears to move easily between market and social structures. But, a more complex version of this relationship is found in O'Donovan and Szyszczak⁶¹. Here they discuss the main difficulties involved in the claim for equal pay using the comparative test. The central problem surrounding such a claim is the finding of a comparable man doing like work in a given occupation in the same employment. This problem is highlighted in O' Donovan and Szyszczak, where it is argued that the finding of a comparable man is almost an impossibility because of the concentration of men and women into different jobs and sectors. O'Donovan

61 cf. op. cit., note 18: p130 et seq..

and Szyszcak explain that men and women do not work in the same jobs because of job segregation. They propose further that women's inferior employment position can be explained by three factors: domestic responsibilities, construction of skills and stereotyping of work⁶².

According to O'Donovan and Szyszcak, SEL does not even begin to tackle these factors. Using the example of the construction of "skill", O'Donovan and Szyszcak argue that the law does not understand how the labour market is being structured. O'Donovan and Szyszcak use "skill" as an example of a structured term, which they argue is built into job evaluation schemes and into the notion of job evaluation generally. Their argument is that the notion of "skill" is structured to the advantage of men and to the disadvantage of women. Yet, they argue, even this assertion is an oversimplification of a very complex process about which, they further argue, little is known. In fact, their overall argument at this stage is that little research has been done in this area and so both they themselves and those interested in changing the law know very little about this whole process. There is an acknowledgment of a lack of understanding here and a realisation that this is an important aspect needing to be tackled by those interested in sex equality issues. In particular, SEL will need to establish a methodology to overcome these difficulties⁶³.

This view poses several problems for this chapter. Importantly, the word "segmentation" is not used in their argument. Segregation and segmentation, two processes which are interrelated in a complex manner, are rolled into one: the process of segregation⁶⁴. The main problem with these arguments, therefore, is that they do not consider to any great degree the process of "engendered segmentation" and, in particular, the role of the demand side in this process. For example, changes in product markets and the reorganisation of

62 *ibid.*: p152.

63 *ibid.*: p135.

64 This is also found in Gregory (*op. cit.* note 20): "the link between job segregation and wage differentials is undeniable; the skills of nurses are undervalued precisely because most nurses are women": p27.

working time, issues needing to be addressed here, are omitted from the above explorations. The critique appears to understand the structuring of the labour market in supply side terms alone. The explanation for inequalities in the market focuses on social structures outside the market and the market is seen to be responding to these structures.

The second critique is, at this point, locating what in fact are segmentation barriers - however, it is ambiguous here as to whether these barriers are recognised as such by the critique or whether they are still being conceptualised as market access barriers (which are caused by external ideology, rather than by being generated through a collapse of supply and demand factors). This means that the critique is pinpointing the same problematic areas of market functioning for the law as are located both by the third critique and by this chapter generally. The second critique is not describing the exact nature of the problem in the same terms, however. From the point of view of the chapter, therefore, the second critique is at this stage giving incomplete arguments for the failure of SEL with regard to its understanding of barrier construction. And, because of this understanding of barrier-construction, the objective justification test is left intact.

At this stage of their critique, O'Donovan and Szyszczak have forwarded their argument to the point where they have almost moved beyond the boundaries of the second critique and into the way of thinking of the third critique. But, their argument still remains within the limits imposed by the second critique. Having highlighted the fact that some of the terms used by law as neutral criteria are in fact structured norms and not at all neutral, O'Donovan and Szyszczak still feel that there is hope for the law in that it has the possibility to overcome this difficulty with more research. There is an underlying expectation that with more knowledge the law will at some stage in the future be able to isolate the sexist element contained within the definition of "skill" from the economic element.

The ability of SEL to do this is, however, open to question. This is highlighted by the third critique in its understanding of where "sexism" enters into the structuring of the space

in question, whether it be society as a whole or simply the labour market. "Sexism" is neither conceived of as an external force distorting the functioning of an otherwise free market place, nor is it found in "social" structures alone. It is there from day one. MacKinnon is insistent on this point:

*day one of taking gender into account was the day the job was structured with the expectation that its occupant would have no child care responsibilities.*⁶⁵

This sentence is very similar to the argument put in Chapter One of the thesis, where it was argued that the part-time job was structured on day one with the expectation that the occupant would be a low paid worker. In MacKinnon there is the reality of the situation, which is one of a continuum. This view is parallel to the understanding of the collapse of supply and demand factors into one continuum of pre-selected part-time employment presented in Chapter One. MacKinnon's critique of SEL starts from a different point but ends up at the same place. Economic requirements would be considered to be already structured according to male norms.

The importance of labour market segmentation is that the market reproduces sex discrimination within its own process, ie. established employment behaviour becomes an internal factor for the market. This process, which I have labelled "engendered segmentation" is thus more readily understood in the third critique as it stands, than in the other critiques. Additionally, the third critique supports the other main criticism of SEL offered by the chapter that not only does SEL assume economic practices to be undistorted, but it also uses the model of men in the labour market as the example of such undistorted economic functioning.

Conclusions

Through an exploration of the structure and critique of SEL, this chapter explored failures of SEL in its application to the labour market. I found that in order to achieve its

⁶⁵ cf. op. cit note 51: p37.

social goal, SEL relied on a specific understanding of labour market functioning. SEL's understanding was at odds with the understanding of labour market functioning as described in Chapter One of the thesis, which highlighted the importance of the effects of barriers on the segmentation process. By contrast, the whole notion of barrier-construction was conceptualised by SEL according to the "sources doctrine", which focused on the "reasons" for barriers. In Chapter One, I argued that such a conceptualisation failed to take on board the findings of advanced segmentation theory which, looking at the effects of barriers on future barrier-construction, located a collapse of supply and demand factors into one continuum of supply and demand. In this Chapter, I found that SEL was unable to conceptualise such a process and, as a result, did not locate the process of "engendered segmentation".

The general critique of SEL was also critical of the conceptualisation of market functioning as understood by SEL. The first critique perceived judges to be acting like employers and misapplying the law as the result of "false assumptions" held about women. The second critique of SEL argued that it failed to locate "sexism" in the structuring of the supply of labour and to reveal "hidden" barriers to market access for women. The third critique argued that SEL failed completely because it failed to perceive the activity of "sexism" in the structuring of the standard, which it itself applied as objective.

This third critique, if applied directly to the structuring of the demand for labour, would also argue that SEL failed to locate "sexism" in this area as well. Chapter Two, taking this critique on board, considered the way in which SEL understood the structuring of the demand for labour, by looking once again at the theory proposed in Chapter One. It became apparent that the structure of SEL was such that it would be limited in its ability to locate the "sexist assumptions" structured into the employers' demands for "suitable" labour. In short, the Chapter realised that SEL would often fail in this area because of its conceptualisation of market functioning. In summary, I would argue that SEL, structured in this way, will not have a far-reaching positive impact on part-time employment as a segmented employment.

The chapter explored some of the difficulties associated with the successful application of SEL to part-time employment. A question asked at the beginning of the chapter was concerned with the possible impact SEL has on the segmentation process. From the findings made here, SEL clearly would not have a great impact on market processes to the advantage of the part-timer. This does not mean, however, that SEL has little impact on market processes. Indeed, other evidence suggests that SEL is taken into account in the structuring of employment by employers, but to the disadvantage of women in employment⁶⁶. For example, the existence of the comparator test has encouraged employers to segregate the segments to ensure that there are no men doing similar work or work rated as equivalent⁶⁷. In this manner, it could be argued that SEL is taken into account in such a way as to minimise costs for employers. Accordingly, SEL can be seen to be contributing to the process of segmentation, which involves the concentration of certain groups in certain employment types⁶⁸.

I do not believe that relying on SEL is the "best way forward" for part-timers in attempting to gain some "equality" in the marketplace. This belief is based on the results found by this Chapter on the inconsistency which exists between the way the labour market is described in Chapter One and the way in which it is conceptualised by SEL. There are other reasons as well, which have not been discussed so far, but which should be mentioned in this conclusion. These are as follows: as SEL is not specifically aimed at tackling the disadvantages faced by part-timers, this means that the individual must rely solely on the judicial activism of the court in question and her own specific situation. This means that rights are acquired for part-timers on an individual case basis, with no uniform application of rights⁶⁹. This problem must be seen in conjunction with general problems of taking a case, eg. the expense,

66 The existence of direct discrimination in law does not seem to have resulted in either the more even distribution of working time or the improvement of part-time employment's market value. cf. op. cit note 5: p43-4.

67 *ibid.*

68 If employers wish to reduce the effects of SEL in terms of cost, policies which either add to job segregation on grounds of sex, or which exclude certain workers from social rights which incur indirect labour costs for the employer, will be attractive.

69 cf. Lacey, N (1992) on group versus individual rights and the limits of law.

the lack of certainty in winning the case, which is particularly true here, willingness on behalf of the worker, time and so on. There does, therefore, appear to be a position forming that some alternative way of tackling the undervaluing of part-time employment by the market must be found. This way would involve a uniform application of law at statutory level, the content of which would be able to directly effect the segmentation process. The rest of the thesis is devoted to exploring such a route at both national and EC levels.

PART III

CHAPTER THREE - "PART-TIME EMPLOYMENT REGULATION: THE APPLICATION OF THE PRINCIPLE OF NON-DISCRIMINATION IN FRANCE"

Introduction

This chapter starts an exploration of a specific way of regulating part-time employment, as a segmented employment type. In the previous Chapter, I explored the legal option of applying Sex Equality Law (SEL) to part-time employment, but found that SEL suffered from the same problematic assumptions as those located in the "sources' doctrine" as it focused ultimately on the causes of segmentation barriers. In this Chapter, I intend to explore a different route which, at least at first glance, is theoretically more advanced in that its focus is on the consequences of segmentation barriers. This route is through the application of an equality principle, which operates between full- and part-time employment on a *pro rata temporis* basis. This principle is called the principle of non-discrimination. By contrast to SEL, the theoretical operation of the principle of non-discrimination is arguably about tackling the effects of segmentation, by extending primary worker rights to secondary workers, without entering into a discussion on the reasons or causes for the difference in treatment.

The "principle of non-discrimination between full- and part-time workers" first appears in an early European Community (EC) draft directive on "the regulation of voluntary part-time employment"¹ and, although not adopted into EC law, this directive greatly influenced the form of law adopted by the French Government in the early 1980s. This chapter looks specifically at the definition and form of the principle, by examining it as it is applied in French public statutory law. This examination will form the basis of a comparison with a

¹ cf. Com(81)775 final. The principle already exists now in most Member States' statutory law. More discussion of the draft directive is confined to later chapters.

study of the UK approach to the enactment of this principle which is the topic of the next chapter.

Labour market changes taking place in France at the end of the 1970s were recognised by the early 1980s French Governments as being significant and far-reaching. The response to such changes in respect of part-time employment was the enactment of a series of laws specifically related to part-time employment. These laws took certain forms and were concerned with the achievement of various outcomes, which will be discussed in detail in Chapter Five.

French Part-Time Employment Policy was concerned, in the main, with the application of the principle of non-discrimination between full- and part-time workers. This chapter will focus on the definition of this principle and the areas of law to which it can be applied. It will be seen that there are potentially many forms which this principle can take. The chapter will consequently be concerned with exploring the form which it takes in French law, by looking in detail at the areas to which the principle is applied in France. Finally, the chapter will highlight key problems associated with the successful application of the principle.

Principle of Non-Discrimination

Inherent in the principle of non-discrimination between full- and part-time workers is the aim to grant part-timers equal rights with full-timers, on a *pro rata temporis* basis. This means that part-timers will be treated equally in relation to full-timers, account being taken of the number of hours worked. In its most complete form, this principle would be applied to all the relevant areas of working life. These can be covered under three main headings: a loose category of miscellaneous rights, normally entitled "protectionist" and "representative" rights, pay and terms/conditions of employment. In its least complete form, this principle may only be applied in one area, or in respect of only one right: for example, it may exist solely as the right for part-timers to have equal access to vocational training as full-timers. The

principle of non-discrimination between full- and part-time workers is thus an equality principle which operates on a *pro rata temporis* basis and compares general rights, pay and terms/conditions of employment of full-timers to part-timers.

The chief characteristic of the principle of non-discrimination is its relational aspect. Part-timers are not, according to this principle, guaranteed a fixed minimum standard of protection in their own right. If full-time workers have few rights, low salaries or poor conditions of work then part-time employees will proportionally have the same. This observation leads directly to the next point. In order for part-timers to be protected or claim rights using this principle, they will have to find full-time comparators with whom they can compare the part-timers' rights, pay or working conditions in order to enforce the principle. The principle needs the existence of full-time comparators (or a full-time comparator) in order to come into operation. What constitutes an acceptable comparator will be explored later on. The fact remains, however, that this principle of equality is one which operates between full-time and part-time workers.

Let us briefly consider the three main areas to which this principle might be applied. The first area to which the principle can be applied covers those rights granted to full-time employees under the main body of protectionist legislation and labour law generally, either at national level or as a result of collective bargaining. This includes such rights as the right to belong to a trade union, the right to be represented, the right to vocational training etc.. The best example of the type of rights being talked about here is perhaps the "Community Charter of Fundamental Social Rights of Workers" adopted by 11 of the Member States in December 1989 at Strasbourg, the UK being the exception. Although this Social Charter is not legally binding on Member States, the standards contained therein indicate the quality of rights acceptable at Community level. Rights granted to all workers at national or company level may include some or all of the rights as specified in the Charter. If the principle were applied in the area of miscellaneous rights it might consequently be used to cover groups of part-time workers working for the same firm, for example.

Secondly, it could be applied to the area of pay. "Pay" itself is a broad term which covers two types of remuneration: direct pay and indirect pay². The European Court of Justice (ECJ) has developed the best definitions of each type of pay³. According to them, direct remuneration is defined as follows:

*the salary for work done, that is to say the salary directly associated with the participation by the worker in the production process.*⁴

Direct remuneration refers to the direct wage or salary received by the employee. Indirect remuneration refers to other sums received by the worker: it has been defined by the ECJ as all the sums of money connected with the employment relationship which are paid to the worker but are not part of the direct salary. This can include benefits and employer contributions to benefits, if the latter are included in the calculation of gross salary⁵. Evidently, there is a great difference between direct and indirect pay.

The principle of non-discrimination can be applied to both direct and indirect pay. Yet, because of the distinction between them, the principle could in fact be applied to the one and not to the other. This will be seen to be important due to the nature of the relationship between direct pay and indirect pay, which is explored in both this and the next chapter. In particular, it will be seen that the successful application of the principle in direct pay greatly affects the successful application of the principle in other areas, especially indirect pay. This is because the level of the salary can be directly related to the level of a benefit itself, or can be directly related to qualification for a particular benefit. This realisation is most noticeable in the application of the principle of non-discrimination in the UK, but will be touched on here.

² This is a distinction devised by the ECJ: cf. *Gabrielle Defrenne v Belgian State* case 80/70 ECJ (1971) ECR: 445.

³ I have chosen to use the ECJ distinction because the European Community draft part-time employment directives, which are discussed later on in Chapter Six, operate around this particular understanding of direct and indirect pay. Additionally, EC discourse on Social Policy, which is discussed in Chapter Seven, uses the terms direct and indirect pay with the meaning attributed to them here.

⁴ cf. *Gabrielle Defrenne v Belgian State* Case 80/70 ECJ (1971) ECR 445: p448.

⁵ This is seen in ECJ Article 119 jurisprudence, cf. *Susan Jane Worringham and Margaret Humphreys v Lloyd's Bank Ltd.* Case 96/80 ECJ (1981) 2 CMLR 1: p19, cf. *WGM Liefdung and Others v Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam* Case 23/83 ECJ [1984] 3 CMLR 702: p714.

Finally, the principle can be applied to the terms and conditions of employment: this means that it would relate to all aspects of the contract or working relationship which do not count either as indirect salary or miscellaneous rights. In particular, the terms and conditions of social security legislation would be relevant here: for example, the sums paid as contributions to a state pension scheme may not constitute indirect salary as defined by ECJ under Article 119 EEC, but are still part of the terms and conditions of employment. If the principle were applied in this area, therefore, it would have a direct bearing on Social Security law in particular. Again, the application of the principle in the area of social security will be seen to have a direct effect on its application in other areas.

It is apparent from the above that the principle could, in its most complete form, operate at all levels of law: the level of statutory law, public authority law, the level of company law or collective bargaining agreements and at the level of contractual law. It could thus be applicable to private contractual arrangements between employers and employees, collective bargaining agreements and relevant statutory laws, such as Social Security law. In its least complete form, it might only exist in private contractual arrangements or, for example, in one industry's collective bargaining agreement. It follows from this that there are many forms which the principle could take. Let us now, through the exploration of the application of this principle in France, explore the form it takes here in more detail.

The Statutory Application of the Principle in France

The move towards new types of non-standard job forms in the late 1970s and early 1980s in France was understood by the Government as an indication of important structural changes taking place in the labour market. By this time, the beginnings of the segmentation process were becoming more noticeable and the Government was keen to play its part in it. The growth in part-time employment, particularly in the services sector, was recognised as a new and important employment trend:

*This type of work will most likely foreshadow working life from now until the end of this century.*⁶

As all aspects of the employment relationship are heavily regulated in France, when employer need for greater flexibility became apparent, it was considered necessary to ensure that any new forms of employment thus created were brought under the remit of mainstream employment law, the Labour Code (Code du Travail). The Labour Code embodies a standard of employment rights considered acceptable to all workers in France and as such has a bearing on the three areas of working life mentioned earlier⁷.

In the 1980s, successive laws were introduced aimed specifically at part-time workers, forming part of the Labour Code. Control of part-time employment now is achieved through the following pieces of legislation: a law of 27th December 1973; a law of 28th January 1981; a regulation of 26th March 1982 (amended by a regulation of the 11th August 1986); a regulation of 31st March 1982; a law of 11th January 1984; plus two decrees of the 5th of March 1985⁸. Up until 1973, extended collective bargaining agreements could set forth specific conditions relating to reduction in working hours for certain categories of workers and had to include part-time working arrangements made with regard to conditions of employment and remuneration under articles L.133-3-12 and L.133-4-6 of the Labour Code. The text of the 1973 law simply allowed the freeing of the individualisation of access to part-time work by requiring employers to re-organise the number of hours of work of an employee who requested a reduction in working time. This law also covered job-sharing, whereby subscriptions for social security contributions were calculated on the basis of the position rather than two separate jobs, thus alleviating the effect of part-time employment for the employer⁹. Part-time employment according to this law was defined as being that worked

⁶ *Cette forme d'emploi préfigure très probablement la vie de travail d'ici à la fin de ce siècle.* Commission preparatory notes cited by J. Gravier, Senator; J.O. Déb. Sénat, séance du 5 Novembre 1980: p4402. 1 col.

⁷ ie. Miscellaneous rights, pay and terms/conditions of employment.

⁸ cf. Savatier, J. (1988): p438.

⁹ cf. Lucas, M. (1981): p534.

between twenty and thirty hours a week. At this time, part-time work was viewed as a form of employment which was voluntarily requested by the individual: this can be seen as a form of flexibility for the worker on a small scale. The later growth in part-time employment, towards the end of the 1970s into the 1980s, was regarded as something more substantial - a long term structural change taking place on a much larger scale. Hence, the later laws have a different character which will now be explored in the sections below¹⁰.

Definitions

The successive laws of 1981, 1982, 1985 and 1986 confer the following definition on part-time employees. A part-time worker is defined as an employee who works on a monthly basis a certain number of hours which is equal to or less than 80% of the normal work month of employees who work in the same branch of activity or for the same employer¹¹. A normal working week is one which consists of 39 hours, with a maximum of 10 hours a day; this lawful length of working time was enacted by a regulation of 16th January, 1982. A part-timer is accordingly a worker who works about 124 hours or less per month, that is about 31 hours or less per week.

Rules relating specifically to part-time employment relationships are included for purposes of both clarity and necessity. An employment agreement in France is not required to be in writing, but a contract for part-time employment (and employment for a fixed period of time) must be in writing¹². The employer is also under the obligation to detail certain aspects of the conditions of employment such as the classification of the employee, his or her remuneration, numbers of hours to be worked per unit (day, week or month) and the maximum number of hours which the employee may work¹³. The employer additionally has

10 For more detail on later laws cf. Belloc (1987): Walsh (1989).

11 Le Code du Travail - Article L.212-4-2 (3): cf. Siméon et Moquet Borde (1990): section 12-42.

12 Le Code du Travail - Article L.212-4-3. This is firmly upheld in *Mme. Hallot c. Sté Biscuits Roulet* 14th May, 1987 - Cour de Cassation. cf. op. cit. note 8: p444.

13 cf. Siméon et Moquet Borde (1990): section 12-43.

the duty to prepare an annual report describing the picture of part-time employment in his or her firm. This must include such things as

*the amount of part-time work performed at his (or her) enterprise during the past year as well as the number, sex and professional qualifications of part-time workers employed during that period.*¹⁴

This report must be circulated to all the various forms of representative bodies such as union delegates and workers' committees. In addition, there are supplementary rules and regulations with regard to movement between full-time and part-time employment. These are part of a drive to free up access to part-time employment and are primarily concerned with the flexibility of the worker. They will be considered fully in Chapter Five of the thesis.

The Principle of Non-Discrimination

The central part of these laws, however, is their endorsement of the principle of non-discrimination between full- and part-time employees. This is confirmed in the report given at the beginning of "Ordonnance no. 82-271 of 26th March 1982", the edict which introduces the Articles relating to part-time employment into the main body of labour law. In this it is clearly stated that the ensuing edict is designed to secure for part-timers a statute comparable to that granted to full-time workers¹⁵. The principle itself is found in paragraphs 8 and 10 of Article L.212-4-2 which read as follows:

*8. Part-time employees benefit from those rights acknowledged to full-time workers by the law, subject to covenants or collective agreements of an undertaking or establishment, with regard to contractual rights, provided in specific clauses by a covenant or a collective agreement.*¹⁶

*10. Taking account of the length of their working time and their seniority in the undertaking, their remuneration is proportional to that of an employee who, with an equivalent qualification, is carrying out an equivalent job in the establishment or undertaking.*¹⁷

¹⁴ *ibid.*

¹⁵ cf. Teyssié, B. (1982): p404.

¹⁶ Les salariés employés à temps partiel bénéficient des droits reconnus aux salariés à temps complet par la loi, les conventions et les accords collectifs d'entreprise ou d'établissement sous réserve, en ce qui concerne les droits conventionnels, de modalités spécifiques prévues par une convention ou un accord collectif.

¹⁷ Compte tenu de la durée de leur travail et de leur ancienneté dans l'entreprise, leur rémunération est proportionnelle à celle du salarié qui, à qualification égale, occupe à temps complet un emploi équivalent dans l'établissement ou l'entreprise.

It is also stipulated by statute that the provisions and terms of a collective bargaining agreement are prevented from being less favourable to an employee than those which would otherwise be applicable under the Labour Code.

If one reads paragraphs 8 and 10 together, one recognises a principle of non-discrimination between full- and part-time workers in respect of representative and protectionist rights, pay and terms/conditions of employment. There are, however, differences between the two paragraphs on how the principle will be applied in the respective areas. The next sections will consequently explore in more detail the differences between the two paragraphs in relation to the application of the principle.

Miscellaneous Rights

Paragraph 8 enshrines a general principle of equality between full-timers, as a group, and part-timers, as a group, covered by the same laws in respect of miscellaneous rights and terms and conditions of employment. The application of the principle to the latter area will be examined at length further on in the chapter. In relation to the area of miscellaneous rights, it is to be noted that no principle of proportionality, ie. no *pro rata temporis* qualification, operates in the application of paragraph 8. This means that part-time employees, irrespective of the number of hours they work, have rights in respect of the following: right to a written contract (detailing the level of the salary, elements to do with remuneration, number of hours to be worked and related facts, specifically those in connection with complementary work hours¹⁸), rights with regard to participation in all aspects of representation, including voting and participation rights, rights with regard to dismissal, rights with regard to promotion in the undertaking and movement between full- and part-time work, right to a paid vacation, rights to redundancy pay and written reasons for dismissal, rights to be registered in the pension system, qualified rights in relation to unemployment benefit and qualified rights in

18 The provisions relating to the written contract are set out in Article L.212-4-3 of the Labour Code.

respect of social security benefit¹⁹. This means that there are very clear and precise provisions referring to conditions of work and the rights of this category of workers in France.

Pay

Paragraph 10 applies the principle of non-discrimination between full- and part-time employees specifically with regard to pay and is apparently far more limited in its application. Firstly, it operates under the *pro rata temporis* rule. Secondly, the comparator is not a group of full-time workers covered by the same laws, but an individual full-time employee, who is carrying out an equivalent job in the undertaking and has an equivalent qualification.

Paragraph 10 applies the principle of non-discrimination to the "remuneration" of part-time employees. Remuneration as a term can cover both direct and indirect pay, that is, it can cover both the wage of the employee and, in some circumstances, the contributions paid by the employers to a social security scheme, for example. There is an apparent overlap here, then, between paragraph 8, which grants part-timers access to such things as social security systems and paragraph 10, if pay refers to indirect pay as well. Some clarification is consequently needed as to the exact application of these two paragraphs. I intend to do this here, firstly, by looking at some cases which are concerned with the application of paragraph 10 and secondly, by exploring in detail the application of the principle of non-discrimination specifically in the area of social security.

¹⁹ The meaning of the qualification of social security and unemployment rights is explored later on in the chapter.

The Application of Paragraph 10 - Some Cases

The first case which I intend to look at, on the question of the application of the principle of non-discrimination as contained in paragraph 10, is *Sté des Nouvelles Galeries c. Mme Bessagnet et autres*²⁰. The regulation of 16th January 1982, which set a maximum length of thirty-nine hours as a normal working week made provisions for collective bargaining agreements which had to allow for monetary compensations for those workers whose total income was likely to be reduced as a result of a lessening of working hours. The objective of this legislation was mainly to safeguard workers' salaries from falling below the national minimum wage threshold (le SMIC: Salaire Minimum de Croissance). The majority of firms paid out sums of money to all their workers as compensation²¹.

As the number of hours worked by a part-time employee is calculated as a percentage of the number of hours worked by a full-time worker, a reduction in the overall working time of the latter would cause a proportional reduction in the number of hours laboured by the former. In the instance of a reduction in working time for part-time workers, it seemed reasonable that part-timers should benefit proportionally from any such compensatory payments made, even in the absence of a contractual order aimed specifically at part-time workers. This is what was decided by the Cour de Cassation (Chambre Sociale) on the 4th February 1987 in *Sté des Nouvelles Galeries c. Mme Bessagnet et autres*²². It was argued by the Cour de Cassation that a firm's or industry's collective agreements must, in virtue of the general nature of L.212-4-2 paragraph 10, be applied to part-timers in proportion to the number of hours worked²³. On the question of remuneration, it would appear from this judgment that the sums of money under review were taken to be sums of money which were

20 cf. op. cit. note 8: p446.

21 *ibid.*: p442.

22 *ibid.*: p446.

23 *Les accords collectifs d'entreprise ou d'établissement doivent, en vertu du caractère général des termes de l'article L.212-4-2 al. 10, et en l'absence de réserves d'ordre conventionnel, bénéficier proportionnellement aux travailleurs à temps partiel. ibid.*

connected to the salaries of the workers, that is they are connected to direct pay. The court thus applied the principle of non-discrimination clearly to the area of direct pay.

A potentially far-reaching aspect of this judgment is the omission of any discussion on the question of an equivalent comparator. There was no long debate on whether the part-timers in question worked on the same job and had an equivalent qualification to the full-time comparators. It is possible to deduce from this that a strict application of the comparator test was not made here. In this manner, the general aspect of the principle of non-discrimination contained in paragraph 8 is present in this interpretation of paragraph 10. Finally, it is noteworthy that part-timers as a group have benefited from this judgment in accordance with paragraph 10.

In the next case, the relationship between paragraphs 8 and 10 is once again under scrutiny. In a judgment on 19th March 1987 by the Chambre Sociale of the Cour de Cassation on the question of surcharges to be paid for part-time employment "overtime", the court ruled that additional hours to be worked requested by the employer are not covered by article L.212-5 of the Labour Code, which provides for surcharges to be paid for extra hours worked by full-time employees²⁴. The key to understanding the nuance in the French language is the comprehension of the two words "complémentaire" and "supplémentaire": "supplémentaire" refers to an accessory to something which is already complete; "complémentaire" refers to the part to be added in order to complete that which is incomplete. Accordingly, the concept of "overtime" does not exist until the worker has worked the normal working week, which is thirty-nine hours. The only case where a part-timer would be paid a supplement would be if his or her income fell below the SMIC. But, according to article L.212-4-3-paragraph 3, additional hours worked by part-time employees may not exceed thirty-nine hours per week. Additional hours worked can only be used, as it were, to complete the normal working week.

²⁴ S'agissant de travail à temps partiel, les heures complémentaires demandées par l'employeur ne bénéficient pas des majorations pour heures supplémentaires prévues par l'article L.212-5 du Code du Travail pour le travail à temps complet. cf. *Sté. Chaussures André c. Mme Sylla* of 19th March, 1987, in op. cit. note 8: p446.

Part-timers according to this judgment, therefore, are not entitled to benefit in proportion to full-timers with regard to their hourly wage rate over and above their contracted working time. The principle of non-discrimination is consequently not being applied in the area of overtime²⁵.

From this judgment, it would appear that, once again, the remuneration referred to in paragraph 10 is direct pay. This case argues that the sums of money in question are not to be awarded to a part-timer on a *pro rata temporis* basis as they are considered to be additional moneys which are specific to the nature of full-time work. The principle of non-discrimination is not being applied here to the area of indirect pay.

The next case to be reviewed, *Sté des Nouvelles Galeries c. Mme Buonocore et autres*²⁶, was also decided by the Chambre Sociale of the Cour de Cassation. In this instance, the court ruled on whether the principle of non-discrimination was still applicable at a moment when part-time workers did not undergo any change in circumstance, whilst simultaneously full-time workers did²⁷. The full-timers in question had suffered a reduction in the number of hours worked and, as a result, had gained an apparent increase per hour of wages. This increase was in fact due to the compensatory payments made as a consequence of the reduction of working time and did not amount to an actual rise in salary. The exact question put at this instance was whether part-timers could demand an increase in wages in proportion to that given to full-timers, when in fact none of the part-time employees had suffered a reduction in the number of hours worked. The judgment affirmed that part-timers must enjoy proportionately the same financial advantages as those gained by full-timers after a reduction in weekly working time of the latter. Again there is reference to the general character of paragraph 10 of L.212-4-2 in the Labour Code.

²⁵ It is conceivable, however, that monetary payments could be negotiated either through the collective bargaining procedure or contractually.

²⁶ cf. op. cit. note 8: p447.

²⁷ *ibid.*: p442.

Here, again, it would seem that the court was keen to apply paragraph 10 to the direct wage rate, even when the circumstances which led to an increase in wages per hour for full-timers did not exist for the part-timers making the comparison.

It would appear from the case law that the principle of non-discrimination as applied in the area of pay does have an impact on employers' freedom to maintain direct pay differentials. However, the question of how the principle of non-discrimination will be applied in the area of indirect pay remains uncertain. This uncertainty in indirect pay may, in fact, only refer to the specific question of overtime, as with regard to other indirect pay, eg. redundancy pay, part-timers are specifically catered for by additional legislation²⁸. This means that although it would appear from these judgments that paragraph 10 refers to the direct wage and paragraph 8 will cover other employment costs, the trend is indeterminate: there are too few cases and the principle has not been fully worked out.

In the cases explored above, the question of what constituted a suitable comparator was not an issue. Indeed, there appeared to be a broad interpretation of this question in respect of paragraph 10. However, the comparator issue still poses a potential problem for the successful working of this principle. For without the comparator, the principle does not come into operation at all. Before going on to explore the form of the principle as applied in other areas, I would like to discuss the likelihood of finding a "suitable" comparator for the operation of paragraph 10.

According to French law, there must be an equivalent comparator working full-time and carrying out an equivalent job with an equivalent qualification against whose salary the part-time employee's is based in order for this principle to come into play. Consequently, the part-timer must firstly find someone working in an equivalent job. But, what happens when

²⁸ This law states that employees with at least two years service who leave at the employer's request, except for misconduct, are due a termination indemnity. The number of hours worked per week does not have any bearing on their rights whatsoever, with the amount of the indemnity being calculated as a percentage of the previous three months average earnings, the percentage itself being based on the length of the working time. cf. Foster, H. (1992): p235.

a part-time employee is working in a job and does not have a "comparator", because there is no equivalent full-time job²⁹. In Chapter One of this thesis, it was seen that the process of segmentation necessarily involves at its most fundamental level the concentration of different types of jobs into different segments. This is particularly the case for part-time employment, with its economic justification resting on the idea that a particular employment relationship is suitable to a particular economic need. Consequently, the ease with which a part-timer will find a full-timer carrying out an equivalent job may well be questionable, given that the nature of the job description or content of part-time employment tends to be unlike the character of full-time employment.

In the second place, the part-timer must have an equivalent qualification to the full-time comparator. In a recent article on research carried out by Maurin and Torelli for the French Institute of Economics and Statistics, it states that in fact the growth in part-time employment has been for the most part in jobs which require little qualification³⁰. Over the last ten years, more than 80% of new part-time positions are in low grade jobs, where few full-timers are employed³¹. This means that in reality the likelihood of finding a comparator with an equivalent qualification is limited. Indeed Belloc, in her Article on part-time employment in France, specifically states that part-timers are on the whole less qualified than full-timers³².

The relational aspect of the principle, which compares two types of employment which are essentially unlike, questions its ability to be far-reaching. This is backed up by evidence which suggests that the principle is not coming into operation in the area of pay as much as it could. Despite this, however, the level of pay of the part-timer in France is higher than in

29 cf. Dale, A. and Glover, J. (1990): p22-3.

30 cf. Maurin and Torelli (1992): p2.

31 *ibid.*

32 cf. Belloc, B. (1987): p116.

the UK, where no statutory enactment of the principle of non-discrimination exists. If this finding is not attributable to the operation of the principle, how is it then to be explained?

The principal other reason for the higher level of the wage of the part-timer in France is arguably due to the existence of a statutory minimum level of pay: the SMIC, which does not exist in the UK. This is backed up by the evidence given by Bouillaguet-Bernard and Gauvin. For example: the increase in the level of the SMIC in 1984 had a disproportionately beneficial effect on certain groups of workers. These groups of workers were as follows: wage earners in small firms, with less than 10 employees, 16% of whom benefited from the increase in the SMIC, as compared to 1.9% of workers who worked in firms with 500 or more employees; 10.8% of manual workers who benefitted, compared with 3.9% of white collar workers; 44% of wage earners in the hair dressing and beauty industry, 24.7% in the clothing industry and 18.8% in the catering industry who benefitted, compared with 0.2% in the oil industry, 0.7% in the chemical industry and 0.9% in banking/insurance industry³³. Hair-dressing, beauty, clothing and catering industries are all highly feminised sectors and also are where part-time employment is most likely to be found. These findings lead Bouillaguet-Bernard and Gauvin to conclude that...

*It seems clear that the firms in which wages are highly concentrated close to the levels of the SMIC also make great use of female labour and that, as a result, the SMIC is the norm for determining the wages of the female rather than the male manual worker.*³⁴

Additionally, they add, other main gainers were those concentrated in small firms, who have been the "biggest net creators of new jobs³⁵". Summarily, it would appear that part-timers' wages are heavily concentrated around the level of the SMIC. It would seem, therefore, that other laws are working here to affect the situation of part-time workers and these laws are equally as, if not more, important to the actual situation of the part-timer in France as is the enactment of the principle of non-discrimination in the area of pay.

33 cf. Bouillaguet-Bernard and Gauvin (1988b): p170.

34 *ibid.*: p170.

35 *ibid.*: p171.

Terms and Conditions of Employment - Social Protection

The application of the principle of non-discrimination to terms and conditions of employment will be explored in this section through the consideration of how the principle of non-discrimination is applied to Social Security law in order to allow for the successful application of paragraph 8 and perhaps paragraph 10. There is an overlapping of Paragraphs 8 and 10 in the area of indirect pay: eg. under paragraph 8, part-timers are in principle granted equal rights with full-timers but, as I have shown, there are cases of exceptions concerning the application of paragraph 10, eg. the right to overtime pay. Through an exploration of the rules regulating the Social Security system in France, I intend to highlight further exceptions or qualifications to the general application of the principle of non-discrimination, which are predominantly located in the area of indirect pay.

Arguably, the principle of non-discrimination is concerned with breaking down the idea that a high level of pay or protection is only granted in respect of a certain type of employment, normally referred to as primary employment³⁶. The principle of non-discrimination states that part-time employment is to be granted the same level of pay and social protection as full-time employment (account being taken of the number of hours worked): full-time employment is usually understood as "normal" or "typical" employment. Consequently, the main obstacle to be overcome in relation to the way this principle interacts with Social Security law is the fact that such law may itself be structured around the "normal" or "standard" employment relationship. This means that in order for this principle to be applied effectively in this area, changes may be needed in Social Security law itself.

A further level of complication arises here. This concerns the question of Family Policy and the way in which Social Security law understands the role (actual and potential) of women in the labour market and in the family. In particular, the level of the expectations of

³⁶ The differences with regard to the perceived functions of the principle of non-discrimination are explored in more detail Chapter Five. The nature of primary employment is explored in Chapter One.

women's, and married women's, labour market earning power endorsed by such a policy is crucial to the general access part-timers as women will have to work-related benefits. Indirectly, the nature of the Family Policy which Social Security law upholds is consequently important to the application of the principle of non-discrimination in this area.

Background to National Health Insurance and Social Security Laws

Let us start this next section by briefly exploring the background to French Social Security Policy. Post World War II France was concerned about the low reproduction rate and a population whose numbers were steadily declining. Population trends generally between 1820 and 1939 had been repetitious due mainly to high infant mortality. Throughout the post World War II period, the Government took an interventionist view of the problem and introduced incentives in the form of benefits to encourage families to have more children³⁷. Hence, in the current Social Security Code there is an extensive list of family-related benefits, eg. young child allowances, family allowances, complementary family allowances, housing allowances, special education allowance, a back-to-school allowance, a family support allowance, a parental up-bringing allowance, a single parent allowance, a home child care allowance and other benefits associated with the family. One of the main formulae used in consideration for entitlement for benefit relates the level or even the granting of the benefit to the number of children in the family being three: levels of some of the above benefits increase as the family grows in numbers. It is quite obvious that these are directed at persuading couples to have larger families. All these benefits are awarded to either parent, thus placing the responsibility of the upbringing of a child, or children, on the parents jointly. Child-care, therefore, is not considered by the law to be the woman's preserve.

Thus, benefits in France are seen to reflect national Social Policy which in this case is designed to increase population figures. This wish to encourage an increase of the population does not, however, seem to be at the expense of the woman's earning power. Figures show

³⁷ Pro-natality measures taken during the 1930s included the setting up of the Family Code, which established family allowances, in the favour of large families. cf. Beechey, V. (1992).

that the actual increase in population post WWII was impressive: according to the 1979 INSEE source³⁸, total population in millions increased from 40.1 in 1946, to 53.4 in 1979; an increase of 13 million. There was, in addition, a rise in the rate of women's participation in the labour market over the same period³⁹. The phenomenon of women entering the labour market at this time does not appear to subtract from their ability to make great contributions to the population figures⁴⁰. It cannot be denied, however, that the French Government has played its part in this. As well as giving families incentives to reproduce, it has also given employers incentives to continue employing and paying social security contributions for certain groups (such as youths and women with sole responsibility for the upbringing of their dependents) even in the face of high unemployment⁴¹.

Women, and in particular the married woman, are expected to be employed and make contributions in their own right to the Social Security system. The married woman's earning power is acknowledged as being separate from her husband's⁴². According to Article L.311-2 of the Social Security Code, therefore, all employers who work for an employer "*in any capacity whatsoever*" must be affiliated to the French Social Security system⁴³. Similarly, contributions are required with respect of all employees⁴⁴. As a result, part-timers are expected to be affiliated to the system.

38 cf. Institut National de la Statistique et des Etudes Economiques - Statistiques et Indicateurs des Régions Françaises (1979).

39 cf. Spivey, A. (1982): p19.

40 This finding is in contrast to the Beveridge Report in the UK, which covers the same period and does not even acknowledge that women have the capacity to bear children whilst, simultaneously, gaining their own earning power. cf. Chapter Four for a full discussion of this report.

41 cf. op. cit. note 39: p23 et seq., for details of these "national employment pacts".

42 Other aspects of Family Policy, eg. the high level of state-provided child-care facilities, are also indicative of this view of women's earning power. cf. op. cit. note 37: p163. Child-care "as a crucial variable differentiating France from Britain".

43 cf. op. cit. note 13: section 12-128.

44 cf. op. cit. note 28: p219.

But, although this means that part-timers may be covered as women, this still leaves the problem of Social Security law being structured around primary labour market behaviour - that is although the part-timer, as a woman, may be potentially independently covered on the basis of her own earning power, she still might be faced with the primary model of a full-time worker, who may or may not be a woman⁴⁵. This situation will be seen to be in direct contrast with the UK position⁴⁶.

The application of the intention to cover part-timers is seen, with regard to social security contributions, in the special rulings made for their calculation by the 1981 law in respect of part-time employees. As a general rule, the total sum of the contributions to be paid by the employer on behalf of the employee is calculated on the basis of the said employee's remuneration (this remuneration includes both direct and indirect pay⁴⁷). Due to the relationship between the social security ceilings and the calculation of the contributions in France, if the part-time employee's earnings rise above the threshold, then it effectively becomes more expensive for an employer to contribute to the social security system on behalf of two part-time employees than it would do for him/her to contribute on behalf of a full-time employee receiving the same salary⁴⁸. In order, therefore, to implement the principle of non-discrimination without placing too great a burden on employers' shoulders, a revised formula is made to calculate contributions for part-time employees⁴⁹. Employers of part-time workers, as defined in L.212-4-2 of the Labour Code, benefit from a reduction in the basis of assessment for the calculation of contributions, with the intention of making up for the difference between the sum of the contributions due in respect of each of these employees and the sum of the

45 Primary labour market models are discussed in detail in Chapter One.

46 cf. op. cit. note 37: p164.

47 L.242-1(1) of the Social Security code is translated in Siméon et Moquet Borde (cf. op. cit. note 13) as follows: "*Such remuneration is made up of, inter alia, the salary, paid vacation and other indemnities, advantages in kind and all other remuneration paid to or placed at the disposal of the employee*": section 12-131.

48 cf. Teyssié (1981): p.531.

49 The formula is as follows: remuneration x (social security ceiling ÷ full-time salary).

contributions which are due, for an identical working period, in respect of the employee, if he/she worked full-time⁵⁰. In other words, the law allows a correction of the basis of assessment to be made which automatically reduces the total amount of the payments made for several part-time employees to that which the employer would have made for the same work, if it had been executed by one employee working full-time⁵¹. In this manner, there is a reduction of the impact that employing large numbers of part-time workers might have had on the thresholds under the old system. In short, the rules for the calculation of the contributions have been changed to deal specifically with part-time employment. This change allows for the application of the principle of non-discrimination in practice, by making payments of indirect labour costs in respect of part-time employment more attractive to employers.

It is evident from the revision of social security contributions that the Government was keen to maintain, as far as possible, equal treatment between full- and part-time workers within the whole jurisdiction of social security. But, the rules relating to benefits under the Health Insurance Scheme and which concern the granting of benefits in practice tell a different story. "L'assurance maladie", or the health insurance, covers a percentage refund on medical costs incurred, maternity benefit, cash sickness benefits, disability benefits and a funeral grant. In order to benefit from this, however, an individual employee must be a resident in France and have worked at least 200 hours in the preceding three months, or 120 hours in the preceding calendar month⁵². Qualification for such benefits thus rests on the part-timer working at least 16½ hours per week, indeed half an hour more than the statutory right entitlement in the UK⁵³. Accordingly, employees who work less than 16½ hours a week are

50 Translation of Law no. 81-64 of 28th January 1981, Article 5, para.1.

51 cf. Teyssié (op. cit. note 48): p532, for cases where this rule is not applied: these include part-time workers who are temporary workers in some circumstances, part-time workers who work in several establishments and other incidences.

52 This ruling is according to Article L.249 of the Social Security Code and Article 1 of decree no. 68-400 of 30th April 1968.

53 The rights of part-timers in relation to full-timers in the UK is explored at length in the next chapter.

not entitled to proportional sick pay, as they should be in accordance with the principle of paragraph 8 of Article L.212-4-2, since they are altogether ineligible for sick pay. They are not entitled to disability benefit or maternity pay. This problem is of particular importance in consideration of eligibility for maternity pay, given the high numbers of women who work part-time.

Although part-timers are granted some elements of indirect pay, eg. redundancy pay, apparently only those who work above a certain number of hours per week are entitled to receive the full range of benefits granted by Social Security laws. In 1986, over 40% of part-timers in France worked under 15 hours a week⁵⁴. Additionally, a look at the case law earlier indicated that other aspects of indirect pay, eg. overtime pay, are also not being granted to part-timers. It would seem that there are two overlapping areas, indirect pay and the more general area of social protection, in which the principle of non-discrimination is either not being applied at all or is being applied according to the 1968 Social Security threshold. This highlights a general and crucial understanding of the operation of the principle in respect of its relationship with Social Security law. Clearly, the level of the threshold set by Social Security law for benefit entitlement (or even access) is a crucial factor related to the complete application of the principle of non-discrimination both in the general area of social protection and in the more specific area of indirect pay. If Social Security law remains structured around a primary employment behaviour pattern, then the effective application of the principle is impossible. This fact will become increasingly apparent in the exploration of the same in the UK⁵⁵.

54 cf. op. cit. note 32: p115.

55 Exactly why the French Government was keen in this particular instance to change the rules of contribution in order to allow for the successful application of this principle, but not the qualification of the thresholds is explored in Chapter Five of the thesis.

Pensions

Part-time employees are covered under the pension system and are entitled to a certain amount of benefit, depending entirely on the type of job which they do and the length of their working time. This reflects the relational aspect of the principle of non-discrimination as intended⁵⁶. The present covered earnings calculation, based on 10 years' service, is extremely useful to them, not only as women, but also because it enables a more flexible approach to movement in and out of part-time employment to be adopted, founded on the knowledge that they will not be penalised for working part-time for some years. At present, the state part of the scheme is more favourable perhaps than some of the private mandatory systems, revealing a difference in attitude between the state and industry⁵⁷.

However, it would appear that the state scheme might also undergo some restructuring in the future which could render it more unfavourable to the female worker⁵⁸. Any change in the number of years' covered earnings on which the pension is based would have a disadvantageous effect on women in employment and women who move in and out of part-time employment in particular. The impact that such change would have on women would be to penalise them for any discontinuity in full-time employment. These changes also appear to be at odds with the Government policy to recognise labour market re-structuring. Bearing this in mind, it is noteworthy that recently Government policy has restructured pension plans to allow for early retirement, ie. to allow for movement into part-time employment before retirement, after a continuous period of full-time employment: private pension plans are also keen on this. This type of movement is in keeping with recent trends in male employment behaviour - the French Government seem keen to encourage this, while maintaining access to a good pension. There appears, therefore, to be a shift in Government

⁵⁶ cf. op. cit. note 28: p222.

⁵⁷ This difference is also true of the UK: cf. Chapter Four of the thesis.

⁵⁸ cf. op. cit. note 28: p217.

policy on socioeconomic mobility which is to the advantage of the male, rather than to the female, part-time worker.

Conclusions

This chapter focused on the application of the principle of non-discrimination between full-time and part-time workers in France. This was done by exploring in detail the form of the principle, as it was applied to certain key areas of working life: miscellaneous rights, pay, and terms/conditions of employment. The French approach to changes in labour market restructuring was one which involved specific regulation of a growing form of employment and the principle of non-discrimination between part-time and full-time workers was included in the main body of employment law as a principle.

I began this exploration of the principle of non-discrimination as an example of a legal route to re-accord value to part-timers which was denied them through the process of engendered segmentation. In France, I found that the principle did not seem to be re-according value in all areas. There are two main levels of explanation for this with which I am concerned. The first is to do with the structure of the principle, whose operational problems I have discussed in this Chapter. The other is linked to policy concerns and the aim behind the enactment of the principle - this is explored in Chapter Five.

In this Chapter, I found that the relational aspect of the principle of non-discrimination was somewhat at odds with a theoretical understanding that the principle is aimed at tackling the effects of segmentation. This is because in order for it to come into operation at all (through the finding of a full-time comparator) the principle denies the fact that the market

is segmented. In practice, therefore, the activating of the principle appears to be hampered by the very process of segmentation whose effects it is seemingly aiming to eradicate⁵⁹.

The principle held its own problems of operation between the different areas to which it was applied. There was a general problem concerning its application between the areas of direct and indirect pay. This manifested itself in French law in the overlapping of paragraphs 8 and 10, which was specific to France. This had certain results. Firstly, there was the issue of a comparator and the link between the level of direct pay, the level of indirect pay and social benefits. Although the application of the principle in paragraph 8 was worded in such a way as to grant part-timers those rights accorded to full-timers without apparent need for a comparator, paragraph 10, which concerns the application of the principle in the area of pay, still required the existence of an equivalent comparator. Although the issue of a comparator was not seen to be problematic in the cases examined, nevertheless, I feel that there are many circumstances when the finding of a comparator will not be possible. This is important, when one realises that the level of direct pay which the part-timer receives greatly affects the levels of some of the social benefits (to which she/he is entitled) if these form part of the indirect salary. In France, this would mean, for example, that although part-timers have the right to belong to a pension scheme (under paragraph 8), if no comparator exists with whom to compare salary (under paragraph 10), then as the calculations of the contributions are based on the level of remuneration, pension levels could drop very low. The importance of the relationship between paragraphs 8 and 10 with regard to indirect salaries must be acknowledged as being crucial to the actual moneys received by a part-timer in respect of her/his rights.

Finally, I found that the success or failure of the principle of non-discrimination could not be discovered by looking at it in isolation, but had to be explored through the examination of a combination of laws, each with their own rationale of labour market functioning. The

⁵⁹ The relational of the principle could also be likened to that of SEL and its effect on the process of segmentation, in that it could encourage employers to segment job types to ensure that the principle could not be applied, thereby saving costs.

examination of the relation of the principle to other laws thus highlighted a conflict between the conception of labour market functioning as understood by the principle of non-discrimination and as understood by other laws. For example, through an examination of the relationship between protectionist or social rights granted in statutory law and the level of the threshold set by Social Security law for benefit entitlement, I found that the structure of Social Security law could impede the successful application of the principle in this area. I found this to be the case especially when Social Security law was structured around primary labour market behaviour. There consequently appeared to be a direct conflict between the aim of Social Security law and the aim of the principle, when the latter was concerned with the restructuring of law to accommodate non-primary employment behaviour. This "conflict" was in fact adjusted for success in some places. eg. in the rules governing employers' contributions to the social security system. Another example of law which operated on some understanding of labour market functioning, in this case women's potential role in the labour market process, was national Family Policy. This policy encouraged women to work and have families: the result of this approach was that women were insured in their own right to the Social Security system. This improved the situation of part-timers, as women. However, I also found that the system remained structured around primary market behaviour, so that although part-timers were conferred rights as women, these rights could be denied them as part-timers. A final example came in the form of the SMIC which had a greater effect in practice on the level of pay accorded part-timers than the operation of the principle of non-discrimination itself. Once again, this was based on a certain understanding of labour market functioning, which differed from that of the principle.

CHAPTER FOUR - "LIFE WITHOUT THE PRINCIPLE OF NON-DISCRIMINATION: LIVING IN THE UK"

Introduction

Changes in the UK labour market during the course of the 1980s and 1990s provoked an active reaction by conservative Governments in respect of part-time employment. Throughout the 1980s, successive UK Governments greatly encouraged the drive for flexibility by employers, including the creation of part-time employment for women. But unlike in France, such a response did not include the enactment of any statutory legislation which was specific to part-time employment. Part-time employment was never directly recognised by public statutory law. On the contrary, successive Governments pursued a general policy of de-regulation of the labour market¹. This contrasts with French labour market policy and the differences between them will be discussed in more detail in Chapter Five.

As a result of this approach, the principle of non-discrimination between full- and part-time workers does not exist in public statutory law in the UK. But, it does not follow from this that there is no form of this principle in existence in the UK. Other public statutory laws are seen to indirectly apply the principle in some form to certain areas of the working circumstances of part-timers: this can result in an "accidental" application of the principle. Additionally, the enactment of the principle in some form can be found in other (lower) levels of law - eg. in collective bargaining agreements or private contractual law. This chapter will not focus on the form which the principle takes at lower levels of law, however, although these will be mentioned where appropriate. The focus of the chapter will be on the situation of the part-timer without a statutory right to the principle of non-discrimination and the consequences this entails.

¹ The term de-regulation is used here to mean partial regulation, rather than no regulation.

The chapter will demonstrate that there are in fact two main consequences of the non-existence of the principle of non-discrimination in public statutory law. Firstly, where the principle of non-discrimination does exist at other levels of law, this is usually the result of union pressure. Secondly, in its absence, the structures of other statutory laws take on a great importance for the working circumstances of the part-timer. This will be illustrated using the format adopted in the previous chapter, considering the working circumstances of the part-timer under three main headings: miscellaneous rights, pay and terms/conditions of employment.

There are many Acts which affect the working circumstances of part-timers in the UK. Here, I am concerned only with the following Acts: the Employment Protection (Consolidation) Act (1978) (EP(C)A)², the Sex Discrimination Act (1975: amended 1986), the Equal Pay Act (1970: amended 1983), the Social Security Acts 1986 and 1990³. Workers are also covered by European Community legislation, especially the Sex Equality Directives and Article 119 of the EEC Treaty. This gives rise to an involved situation, wherein part-time workers can be protected by provisions in a whole host of acts depending on how many hours per week they perform and if they have been in continuous employment over a certain period of time. I intend to explore some of these complexities below.

Definitions

The criteria used for defining part-time work are non-uniform and, in each case, are dependent on the Act which is being applied at the time. According to the "New Earnings' Survey", part-timers are those workers who work less than thirty hours per week; the "Labour Force Survey" and the "General Household Survey" rely on respondents' own definition of whether or not they are a part-time employee; Family Income Supplement considers

2 As amended by subsequent Employment Acts.

3 Other main laws include the Employment Acts (1980 & 1982), the Trade Union and Labour Relations Act (1974: amended 1976), the Health and Safety at Work Act (1974), the Race Relations Act (1976) and the Wages Act (1986) cf. Humphries, J. (1983): p27 and Morton, L. (1987) p29. From 1969 - 1972 the Selective Employment Tax restricted the number of part-time jobs being created, cf. Mallier, A.T and Rosser, M.J. (1980a): p4.

employees who work less than thirty hours a week to be employed part-time, although single parents are considered differently and are in part-time employment only if they work less than twenty four hours per week; Supplementary Benefit uses the "less than thirty hours per week" classification⁴.

The EP(C)A protects workers who work normal working weeks, subject to qualifying periods of employment. Some of the rights it contains are applied to all workers, however, irrespective of the number of hours worked per week. Under this Act a normal working week is described as follows, in Schedule 13:

*Any week in which the employee is employed for sixteen hours or more shall count in computing a period of employment.*⁵

Section 6(1) and (2) of Schedule 13 elaborate further on what constitutes a "period of employment": any period when the worker in question normally works less than sixteen hours a week, but more than eight hours a week, under a contract of employment for five years or more⁶. Accordingly, a part-time worker in respect of the EP(C)A is someone who normally works less than sixteen hours a week for a continuous period of employment of less than five years. This means, for example, that a hairdresser who has been employed for ten years and who might only work three mornings a week is considered as being a full-time worker with respect to qualification for statutory rights under the EP(C)A.

Further explanation of definition of work-type for qualification for statutory rights is explained at point 146(4) and following. It is to be noted that a "qualifying period of continuous employment" is one where the employee works a normal working week and there are no gaps in his or her period of employment. There are periods where the employee might not be at work and nevertheless is still considered as being in the state of continuous employment. These exceptions are listed at number 9, Schedule 13, and cover temporary

4 cf. Morton, L. (1987): p9.

5 Employment (Consolidation) Act 1978 c.44.p1063 Schedule 13 Section 151. at point 3.

6 ibid. c.44. p.1064 Schedule 13: Section 151 at point 3.

cessation of work for reasons such as sickness, injury, pregnancy, arranged or customary absenteeism and so on. Unfair dismissal or industrial action also apply in these circumstances.

Finally, employers will tend to define a part-time worker as someone who works less than the standard full-time working week, which will be more than a normal working week as described in Schedule 13. For example, in the House of Lords' Report on the European Commission's draft directive on voluntary part-time work, Barclays' Bank Ltd. defined part-time employees in the following manner; "*it is anybody who does not work 35 hours a week under a full contract*"⁷. This definition is more akin to the French statutory definition of the part-timer.

The Existence of the Principle of Non-discrimination at Other Levels of Law

As has been said, the public statutory legislation in the UK does not acknowledge the principle of non-discrimination between full-time and part-time employees. This does not mean that the principle does not exist at all, however. On the contrary, some trade unions have campaigned for improved negotiated rights and contractual rights which do enact this principle. It is the role of the trade unions and in their absence or weakness that of the wages council⁸ to bargain for collective agreements, under the terms of which employees can claim negotiated rights. The TUC has, to this end, produced a list of guidelines in order to implement the principle of non-discrimination in the negotiation of collective agreements. The pamphlet on part-time workers published by the Labour Research Department contains a list of priorities to be included in collective agreements. These include...

*hourly wage rates equivalent to those paid to full time workers; entitlement to benefits...on the same basis as full time workers; allowances - such as London weighting; pension rights; inclusion in job security agreements; adequate meal breaks; inclusion in training schemes and no bar in promotion; extra payments for working unsocial hours; no discrimination between part-time and full time workers in redundancy agreements.*⁹

7 cf. House of Lords, Session 1981-2, 19th Report on Com(81) 775 final: p53.

8 These are now being abolished. This will have a serious disadvantageous effect on the position of part-time workers in the UK generally.

9 cf. Labour Research Department Pamphlet (1986): p22. These guidelines amount to the application of the principle of non-discrimination in certain areas.

Hence, certain part-time employees' contracts may include parts of the principle, possibly with regard to remuneration and conditions of employment, as a result of union pressure¹⁰. As there is no legal guarantee at statutory level that any part of this principle is perpended in the drafting of a contract (written or unwritten), the result is that part-time employees in one industry may have more rights than part-time workers in another industry. Similarly, individuals' contractual rights might also differ between firms or companies and maybe also within undertakings. It is, therefore, impossible to deny the existence of the principle of non-discrimination outright, but it is equally impossible to deny that its inclusion in contracts depends predominantly on the power of the trade union concerned and the desire of that union to negotiate with the intention of securing rights for part-time employees¹¹. The general picture, however, does not seem very positive:

most employers' sick pay schemes do not cover part-time workers¹² and employers who provide pension schemes usually exclude part-time workers.¹³

It is safe to assume that, in general, part-timers are not covered by any enactment of the principle. Given that the principle does not exist in public statute, the structure and content of other laws must be considered in its place¹⁴. For reasons of clarity, the chapter will repeat the format adopted in the previous chapter and consider the three areas of working circumstances for the part-timer: miscellaneous rights, pay and the terms/conditions of employment. It is assumed in each case that the hypothetical part-timer in question is not covered by the principle in any other form. This should highlight the situation of the part-

10 For a detailed run down of the content of collective bargaining agreements in three sectors - Local Authorities, Finance Sector and Retail Sector, cf. Dickens, L., Townley, B., and Winchester, D. (1986): pp35 et seq..

11 There is no legal requirement in the UK that employers should either recognise Trade Union views nor indeed follow a philosophy of joint regulation.

12 cf. Sedley, A. (1980): p22. My emphasis.

13 *ibid.*: p23. My emphasis.

14 It is important to look at statutory law, rather than focus on the content of collective agreements. This is because so many part-timers are non-unionised and only a few who are will be covered by the principle of non-discrimination. It is also felt that the focus of this chapter should be on the situation of part-time employees, who are not covered by the principle, in order to establish the advantages and disadvantages of the principle to part-time employment.

timer without the principle and provide a focus of comparison with the situation in France for the next chapter.

Miscellaneous Rights

The EP(C)A is considered as embodying a "floor of rights" for workers¹⁵ and thus would belong to the miscellaneous category of rights as described in the previous chapter. Although this Act does not actively apply the principle of non-discrimination, in fact part-time employees who work more than sixteen hours a week (and have been in continuous employment for the previous two years) do have access to the same rights as full-time workers. This is because the EP(C)A considers as full-time workers all those who work more than sixteen hours a week (for two years) whereas, as has been seen, an individual's work contract may consider him/her as a part-time workers on a twenty-five hour weekly contract, for example.

However, there are few statutory rights which can be applied to part-time workers who either work less than eight hours a week, or who work between eight and sixteen hours a week but have not been continuously employed for a period of five years or more, or who work more than sixteen hours a week, but have not been in continuous employment for the previous two years. In fact, their sole right is the right to belong to a trade union, protection being guaranteed against victimisation for participating in trade union activities¹⁶. They are not entitled to the following rights: they are not entitled to a written contract of employment which details particulars relating to their conditions of work; consequently they have no right to written statements concerning changes in the terms of their employment¹⁷. They are not

15 cf. Wedderburn, K.W. (1986).

16 cf. Part II, point 23.

17 This has now been amended by the Trade Union Reform and Employment Rights' Act C.19 1993 (TUREA). cf. ss. 26 & 27 TUREA and Schedule 4 & 5(1)(b), which lower the threshold for qualification for this right to 8 hours per week, and EC Council Directive 91/533 of 14-10-91 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288/32, 18-10-91.

entitled to itemised pay statements. It is made quite explicit under 146(4) that part-time workers as described above may not be guaranteed time off for carrying out trade union activities or public duties. They have no statutory rights with regard to unfair dismissal for pregnancy¹⁸; no right to maternity pay or reinstatement after birth; no right to written reasons for dismissal nor a minimum period of notice for termination of employment; no right to redundancy pay or medical suspension pay. Finally, it should be noted that there is no statutory entitlement to a paid holiday for any worker¹⁹.

All workers are additionally formally protected from race and sex discrimination by virtue of the relevant Acts, and are entitled to equal pay as defined by the Equal Pay Act 1970 (as amended by the Sex Discrimination Act 1975 and the Equal Pay (Amendment) Regulations 1983)²⁰.

Pay

In the previous chapter, the application of the principle of non-discrimination in the area of pay was explored by looking at some cases taken by part-timers in France. It was seen that whereas the principle was apparently easily applied in the area of direct pay, its successful application in the area of indirect pay remained uncertain. Additionally, it was argued that the level of direct pay a part-timer receives is extremely important, not just for its own sake, but because it has a direct effect on indirect payments. The nature of the relationship between direct and indirect pay was seen to be crucial to the functioning of the principle. In order to draw a comparison with these conclusions, this section will focus on

18 This has also been amended by TUREA, cf. s.24 TUREA 1993.

19 An attempt has been made to apply the principle of non-discrimination to this area using Sex Equality Law and the concept of indirect discrimination. The case was taken on behalf of Patricia Day by the Equal Opportunities Commission. Unfortunately, this case failed. The Court of Appeal ultimately upheld the 16 hour threshold for qualification for employment rights as being "objectively justified". The difficulties of applying Sex Equality Law successfully to part-time employment are discussed in general in Chapter Two of the thesis. The case in question here will be discussed in detail in Chapter Five.

20 A discussion of the problems associated with the relation of Sex Equality Law and part-time employment is given in Chapters Two and Five of this thesis.

what amounts to UK attempts to apply the principle of non-discrimination between full- and part-time workers in the area of pay.

As there is no principle which grants part-timers equal pay with full-timers on a *pro rata temporis* basis enacted in public statutory law, then part-timers must make claims for higher wages using other available laws. The laws which have been used in this situation are the Sex Equality laws, eg. the Equal Pay Act (EqPA), the Sex Discrimination Act (SDA) and EC law. Hence, the part-timer is essentially wishing to make a claim for equal treatment on a *pro rata temporis* basis with a full-timer, but will have to adapt this claim in order to make use of the legal provisions available. More specifically, the rationale of the claim is one of proportionality founded on the principle of non-discrimination between part-time and full-time workers. But, the actual claim itself becomes a different kind of claim in order to be applicable to the provisions of the Sex Equality Laws: it becomes a claim alleging that discrimination on the grounds of sex has taken place to the detriment of the part-timer in question, depriving her of her rights to equal pay with a male full-time employee. Thus, the "purpose" of the claim, which is to gain higher wages on a *pro rata temporis* basis with full-timers, is complicated by the introduction of sex discrimination as an issue.

This has two results: firstly, the sex of the part-timer becomes an issue. Secondly, because of the structure of Sex Equality Law (SEL)²¹, a defence will be allowed to the employer, whereby he/she may justify the difference in treatment as between the part-timer (as a woman) and the full-timer (as a man) for reasons other than sex. This means that a fundamental difference in the procedure of applying the principle of non-discrimination can be detected which involves the questioning of the reason for the barrier on behalf of the employer. In other words, whereas the straightforward application of the principle of non-discrimination allows the part-timer the same treatment as the full-timer, this will only occur

²¹ The structure of Sex Equality Law is described in detail in Chapter Two of the thesis.

under SEL if the difference in treatment amounts either to a sexist barrier or to a neutral barrier which cannot be objectively justified.

This is exemplified in the area of pay under the EqPA where the defence allows the employer to show a "genuine material difference or factor" justifying the alleged sex discrimination. Under EC law and Article 119, the ECJ has developed this defence and introduced a more stringent test, which I refer to as the "objective justification" test²². This test allows national tribunals the final decision in whether the defence is objectively justified²³. Consequently, it is important to look at how national rulings on equal pay cases in the UK have applied this test and the types of defences which have been allowed in order to consider the situation of the part-timer in the UK in the area of pay.

The Application of Sex Equality Law to Part-Time Employment - Some Cases

The first case to be discussed is one taken in 1978 under the EqPA. At this point in time, the role of Community law in this area was uncertain and, indeed, this case does not have a Community angle. The case *Handley*²⁴ concerned a claim for equal pay by a female part-time employee with a male full-time employee working in the same establishment. The industry in question was a manufacturing clothing industry and the claimant herself was a machinist. It was argued that the claimant earned an hourly rate of £1.61, whereas her male comparator earned £1.67 an hour²⁵. This case was concerned with direct sex discrimination between a man and a woman in the area of direct pay.

The employer's defence rested on arguing that the difference in the hourly rate of pay was genuinely due to a material difference other than sex between the part-timer and the full-

²² cf. *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* Case 170/84 ECJ (1986) ECR 1607.

²³ On the whole, national courts in the UK have tended not to apply this test in a strict manner.

²⁴ cf. *Mrs. Handley v H Mono Ltd.* IRLR (1978) 534.

²⁵ *ibid.*

timer. This was argued as follows: the job done by the full-time employee was of a different kind in a quantitative sense. The full-time employees, it was argued, were making a higher contribution to the overall productivity of the company, simply because the machinery was in use for a longer number of hours. It was argued that the machinery was out of use when the appellant was not at work. It was accepted that the part-timers were equally skilled as the full-timers, but were simply contributing less overall to the productivity of the company. A direct link was consequently made between high productivity and a high wage. It was further argued that women working a 40 hour week were paid the same rate as the men. A material difference other than sex, here, level of productivity, was the reason for the difference in pay levels.

This was upheld by the court. The ruling in *Handley* consequently did not allow for the application of the principle of non-discrimination in the area of direct pay. The next case, *Jenkins*²⁶, taken in 1980, questioned this outcome. This case also concerned the level of pay of a part-timer in a manufacturing clothing industry and it was also concerned with the application of the principle of non-discrimination in the area of direct pay. The argument that *Handley* was surely contributing an equal amount to the company per hour of work, and that, therefore, her pay should be equal per hour to the full-timer in question, although not voiced in *Handley*, was queried in *Jenkins*. Moreover, *Jenkins* highlighted some important questions on the concept of indirect sex discrimination in the area of direct pay which will be considered here.

The original tribunal, relying on the Employment Appeals Tribunal's ruling in *Handley*, and basing its arguments on a finding of fact, upheld what it considered to be a valid defence by the employer. The employer had argued that the difference in pay was due to a material difference other than sex: the need to ensure that expensive machinery was used to

26 cf. *Jenkins v Kingsgate (Clothing Productions) Ltd.* Employment Appeal Tribunal, (1980) IRLR 6.

its fullest extent, the need to encourage greater productivity and the need to discourage absenteeism. The high pay can thus be seen as containing an element of incentive.

On appeal to the Employment Appeal Tribunal (EAT), it became apparent that Jenkins could not continue to pursue her claim under the Equal Pay Act. The EAT agreed to refer the case to the European Court of Justice (ECJ) for a preliminary ruling²⁷, to see how the principle of "equal pay for work of equal value" contained in Article 119 could be applied here. In particular, the EAT was interested in establishing firstly, whether the difference in the number of hours worked is alone enough to justify the difference in an hourly wage rate between full- and part-time workers and secondly, whether the fact that large numbers of women worked part-time was a relevant factor. The EAT can be seen to be hinting at whether this case was not in fact about indirect sex discrimination in the area of pay and whether Article 119 covered such a case.

The concept of indirect sex discrimination in the area of pay was arguably enhanced by this referral, although the ECJ's ruling was rather vague. The ECJ ruled that the difference in hourly rates of pay between part-time work and full-time work would not offend the principle of equal pay in Article 119, but only if it was also attributable to factors other than the number of hours worked. Additionally, these factors had to be objectively justified. As an example of such a factor, the ECJ specifically cited the case where the employer is...

*endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.*²⁸

In this instance, the ECJ was suggesting that a valid defence would be the economic advantage for the employer in encouraging full-time work. In this way, the employers' intention or objective was held to be relevant and it was left up to the national courts to decide whether the hourly rate of pay was justified by any such economic intention. Bearing any such intention in mind, the courts also had to decide whether or not the difference in pay was in

²⁷ The elements of Community Law which applied in this case were Article 119 of the EEC Treaty and Article 1 of the EEC Directive 75/117.

²⁸ cf. Verwilghen, M. (1987): p261.

reality discrimination based on sex. How the courts were to go about doing this was left unsaid.

On receiving the case, the EAT clearly understood this case to be about indirect sex discrimination in the area of direct pay. They emphatically stated that...

*section 1(3) [of the EqPA] should be construed as imposing on the employer the onus of proving that a variation in pay between a woman and a man employed on equal work is in fact reasonably necessary to achieve some objective other than an object related to the sex of the worker.*²⁹

Following from ECJ guidelines, the EAT consequently argued that an adequate defence must be seen as one which achieves economic advantages to the employer other than cheap labour: the fact of being a part-time worker is not a defence in itself. Some guidelines were issued to this effect. According to these, a defence can only be upheld in a case alleging indirect sex discrimination if the employer can show firstly that he/she did not intend to discriminate against part-timers on the grounds of sex and secondly that he/she did not desire some result which in reality was cheap labour³⁰. It was also understood in this case, that where part-timers were involved, indirect sex discrimination was the issue, as part-timers constituted a group of workers composed predominantly of women.

This case was consequently keen to understand how to apply the principle of non-discrimination in the area of direct pay using the concept of indirect sex discrimination. There were two limitations still however: firstly, there was the problem of the comparator test, which lay uneasily with the segmentation process. Secondly, there still remained the problem of conceptualising the economic requirement as being objective and neutral³¹.

29 cf. *Jenkins v Kingsgate (Clothing Productions) Ltd.* IRLR (1981) 388.

30 "If the industrial tribunal finds that the employers intended to discriminate against women by paying part-time workers less, the employers cannot succeed under section 1(3)".
 "Even if the employers had no such intention, for section 1(3) to apply the employer must show that the difference in pay between full-time and part-time workers is reasonably necessary in order to obtain some result (other than cheap labour) which the employer desires for economic or other reasons", *ibid.*

31 cf. Chapter Two for a discussion of this.

The final case, *Calder*³², was originally taken in 1992 and concerns a potentially more interesting feature, namely what can be read as an attempt to apply the principle of non-discrimination in the area of indirect pay (although the case is not overtly about this). Mrs Calder was employed part-time on a twilight shift from 5.30 to 10.30pm five days per week. Her male comparator was employed full-time on a rotating shift - 8am to 4pm one week and 4pm to midnight the other week. Their work was conceded to be of equal value. Both received the same hourly rate of pay, but the full-timer received a shift premium of 20% of his pay, calculated on a special rate. This resulted in him taking home an extra £28.08 per week. Thus, there was a difference in indirect pay as between the part-timer and the full-timer.

For some reason, this case was not taken on the grounds of indirect discrimination (although it was conceded in the hearings that the twilight part-time shift was staffed exclusively by women). Neither did the EAT nor the Court of Appeal attempt to apply indirect discrimination to this case. On the contrary, both courts ruled explicitly that this was a case of direct discrimination. As a result of this fact, the test as established by the ECJ and the guidelines as laid down in *Jenkins* were not applied here. In fact, in the EAT ruling, it was expressly stated that section 1(3)(b) of the EqPA and section 1(1)(b)(i) of the SDA did not have to be read together in all pay cases³³. Instead, the employer was allowed a simple defence under section 1(3)(b) of the EqPA, which meant that a "genuine material difference" had to be established. The employer did not have to demonstrate either a need or an objective on his/her behalf which justified the premium paid to the full-time worker.

Consequently, the defence which the employer gave was that the premium granted to rotating shift workers reflected "*the inconvenience of being required to work rotating shifts*"³⁴.

32 cf. *Calder and Cizakowsky v Rowntree Mackintosh Confectionery Ltd.* EAT (1992) IRLR 165.

33 cf. op. cit. note 32: p166. Section 1(1)(b)(i) of the Sex Discrimination Act and 1(3)(b) of the Equal Pay Act make up the "objective justification" defence in indirect sex discrimination in the area of pay.

34 cf. *Calder and Another v Rowntree Mackintosh Confectionery* Court of Appeal IRLR [1993]: p212.

In other words, it was justified according to the (assumed) need of the worker³⁵. Additionally, it was not made explicitly clear what the exact nature of this inconvenience was: at one point in the hearing, it was suggested that rotating shifts caused disturbed sleeping patterns for the worker which was disruptive of normal family life. More importantly, it was also conceded by the employer that "*there is an element in the premium of compensation for working unsocial hours*"³⁶. This part of the defence was, however, held as irrelevant to the final judgment:

*The fact that some indeterminate part of the shift premium represented compensation for working unsocial hours did not necessarily preclude a finding that the payment of the shift premium was genuinely due to working rotating shifts.*³⁷

The defence was upheld by both the EAT and the Court of Appeal. The application of the principle of non-discrimination in the area of indirect pay was thus not apparently possible using the concept of direct sex discrimination.

What conclusions can be drawn from these cases? The first observation which can be made is that it would appear to be very difficult to apply the principle of non-discrimination in the area of pay using SEL. There are several reasons for this, which were explored theoretically in Chapter Two of the thesis. Here, I intend to concentrate on the difficulties of the important usage of the "objective justification" defence as seen in the above cases.

Let us look once again at the defence in *Calder*. Admittedly, this is not a true "objective justification" required for an indirect discrimination case, but this does not prevent certain comments from being made here. It is to be recalled at this stage that in Chapter Two of the thesis, it was argued that the structure of SEL, based as it is on a certain view of the function of "sexism" in labour market processes, would limit its ability to locate sexist practices in

35 The "need" in question was probably expressed by a Trade Union in earlier negotiations determining pay: this is implied later on in the hearing: cf. op. cit. note 34: p214.

36 cf. op. cit. note 34: p212.

37 *ibid.*: p213. In fact, this question has been referred to the ECJ in respect of indirect sex discrimination cf. *Enderby v Frenchay Health Authority and Secretary of State for Health* Court of Appeal (1992) IRLR 15. This case has now been decided cf. Case C-127/92 (IRLR) 91: the ECJ ruled that it was up to national courts to determine this question, but clearly stated that economic grounds may include, if they can be attributed to the needs of the undertaking, such criteria as the worker's flexibility or adaptability to hours of work.

economic decisions made by employers. In *Calder*, the "reason" for the premium was given (and accepted) as the inconvenience of working on a rotating shift. A further reason was given, which was not held as being relevant to the final judgment, namely that there was an element in the premium of compensation for working unsocial hours³⁸.

Leaving aside the idea of compensation for unsocial hours, let us look at the idea that the rotating shift is inconvenient to the male full-time worker. The following question is posed - why is it more inconvenient for the full-time worker to work until midnight, ie. an hour and a half later than the part-timer every other week? Surely, it is almost as inconvenient for the part-timer to work until 10.30 every night? Maybe, she would not have sleeping difficulties due to the continual weekly adjustment, but could it not be argued that her family life would be almost as disrupted, given that she leaves the workplace only an hour and a half before the full-timer every night? This question was not asked in this case.

Let us look now at the question of unsocial hours. It is even more persuasive that the part-timer works the same unsocial hours as the full-timer, except for an hour and a half between 10.30 and midnight (it was even conceded that on Friday nights "the men" leave early). In other words, the reason for the premium being granted to the full-timer and not the part-timer surely goes beyond the simple difference of a "rotating shift" versus a "part-time shift"³⁹.

It is made clear in the judgment that the deeper reason for the difference is not on trial here. It is suggested in the hearing that in fact the payment of a premium solely to full-timers only came about in 1982, during some re-structuring of the company, when the unions persuaded the management to remove the unsocial hours' premium paid on all work between 4.30pm and 7.30pm and to pay it only in respect of rotating shifts. In other words, the

38 cf. op. cit. note 34: p214.

39 The EAT ruling in *Jenkins III* (op. cit. note 29) would surely question this as an adequate defence.

existence of part-time employment (all women) without the premium can arguably be seen as being already structured with sexist assumptions that women want to work part-time, that they choose to work the late part-time shift because of family responsibilities and, therefore, there is no inconvenience for them and the hours are "social" for them. The role of trade unions in the process is also as expected by Chapter One of the thesis, ie. that there would be sexist prejudice involved in the demands made by trade unions, who obviously believed that part-time work was not inconvenient to women. The test as applied here does not question this decision. Both the EAT and the Court of Appeal expressly say that it is not their duty to decide how much of the premium is based on unsocial hours and how much on inconvenience. Yet, even on the question of inconvenience alone, the test does not question how this is understood in the decision. The test in fact allows the upholding of a decision, itself structured with sexist assumptions about women, to constitute a "genuine difference".

Further, it is interesting to ask what the employer would have had to say if this case had been taken on the grounds of indirect discrimination. The employer would then have had to objectively justify the need for the premium for some other reasons based on his/her need. Reasons given in other cases of a similar kind include the need to "attract" full-timers. This is seen in both *Handley* and *Jenkins* where the employer argues that full-time employment is to be encouraged, hence the higher wage. But, what is used to attract part-time employees? Does the lower wage accorded part-time employment mean that either there is no need to attract part-time employees or even that women are attracted by a lower wage? It would seem that the reason why the lower wage can be maintained is because there is a cheap supply of labour available and that for this reason, there is no need to pay the higher wage. This again goes back to the notion of pre-selected low paid part-time employment for women which, as shown in Chapter One, implies a collapse of supply and demand factors. The process which leads to the demand for "suitable" workers was shown to be one shaped by engendered segmentation. The test operating here is unable to discern such a process at play in the shaping of the "objective justification" defence.

The situation in the UK for the part-timer attempting to claim a higher wage is consequently highly problematic. Their main obstacle is the structure of SEL and the "objective justification" test. The part-timer is thus left frustrated by the process of the claim under SEL. So, without the enactment of the principle of non-discrimination, the ability of the part-timer to improve her working situation through SEL is reduced by the structure of the law itself⁴⁰.

Terms/Conditions of Employment - Social Protection

This section will consider the rules of Social Security legislation and the National Insurance Scheme to see what kind of rights part-timers qualify for under these laws in the absence of the principle of non-discrimination. In France, the way in which Social Security law was structured was seen to be vital to the successful application of the principle of non-discrimination in this area. This relationship between the structure of Social Security law and the application of the principle was especially clear in the granting of benefits, where it was found that Social Security provisions continued in certain areas to be structured around primary labour market behaviour. This limited the application of the principle of non-discrimination, if the principle was not applied directly to the law.

But, this effect of Social Security law on the application of the principle did not only occur in a direct manner. It was also found that the way in which Social Security law was formulated on expectations of women's (and married women's) earning power was crucial to the end position of the part-timer.

This section will consequently explore the same issues and consider the structure of Social Security law from both these angles. In particular, this section is interested in establishing the relationship of the threshold for National Insurance contributions with both

⁴⁰ The ability of the part-timer to improve her situation through collective bargaining is limited by three main factors: 1) low unionisation of part-timers 2) unions can be reluctant to campaign for part-timers as women and/or as secondary workers 3) in any case, trade unions' powers have been severely reduced. Additionally, there is no national minimum wage in the UK.

the level of wages of part-time workers and with access to rights as established by the EP(C)A. The section will also be keen to see what expectations of women's labour market behaviour over the same period is upheld by the UK law.

Background to National Insurance Scheme and Social Security Laws

The National Insurance Scheme (NIS) came into being as a result of the suggestions made in the Beveridge Report 1942⁴¹. The NIS has as its basis a fundamental notion, which was contained in the Beveridge Report, namely that all workers, employers and the state should make a weekly contribution to a social insurance fund and that the sums thereby accrued should be paid out as social security benefits, to be defined by social security legislation. As part of this plan, the Beveridge Report fostered the concept of a new and important right, namely that:

*everyone who contributed should be assured of a minimum subsistence income as of right; there would be no question of a means test.*⁴²

The most striking feature of the report, from the point of view of the chapter, is the fact that it excluded married women from this fundamental idea. Married women were excluded from making contributions to the social insurance fund and were consequently excluded from the right to a minimum subsistence income from the state, without question of a means test. Married women were in fact classified separately in the Report as belonging to "Class III", the only class not required to make payments. The understanding of this exclusion is best explored through a consideration of the Report's own understanding of the concept of marriage from the point of view of the woman.

The Report was keen to link "marriage" for women with "reproduction" and "security". With regard to the former, it was noted in the Report that there was a problem of a low reproduction rate in Great Britain. "Marriage" was talked about as if it were a precursor of "maternity" and as if it were the solution to the problem of a low reproduction rate. As a

41 cf. Beveridge, W (1942).

42 cf. Foster, H (1992): p7. cf. Beveridge Report, paragraph 27. The other main right introduced by the Report is the right to free medical attention.

result of this assumption, "marriage", but particularly the child-bearing and rearing element, was elevated to national social policy status:

*In the next thirty years housewives as mothers have vital work to do in ensuring the adequate continuance of the British race and of British ideals in the world.*⁴³

The onus for child-rearing was firmly placed onto women. The contribution to be made by married women to the "nation" was thus one which was to be made outside the labour market.

The second link made in the Report, that of "marriage" to "security", emphasised this point further. Consider the following statement:

*On marriage a woman gains a legal right to maintenance by her husband as a first line of defence against risks which fall directly on the solitary woman; she undertakes at the same time to perform vital unpaid service.*⁴⁴

According to this, the married woman's security was to be acquired from the husband, rather than from the state: the wife's social and economic status was to be acquired through her husband's earning power, rather than through her own earning power. Indeed, her potential earning power in the labour market was reduced to "unpaid service" outside the labour market. Moreover, it was now ambiguous as to whether her "vital service" was a service performed for the "nation" or for her husband, as insurer.

All in all, the married woman was expected to have a high dependency on her husband's earning power: she was not to be directly insured by the state. Thus, she was not requested to make contributions to the social insurance fund, but was instead expected to receive access to benefits through her husband's contributions. There were two main results of this which are relevant to the consideration of both the NIS and Social Security law in the context of this chapter. Firstly, a married woman's potential earning power was not

43 op. cit note 41: para. 117.

44 op. cit note 41: p108.

acknowledged by the Report⁴⁵. Secondly, the whole concept of a social security system was aimed at male workers who were perceived, if married, to be providing for a family.

This situation is in direct contrast to the one described in the previous chapter on the French understanding of how to improve the low reproduction rate. In France, the aim of increasing the population was not one which required the denial of the married woman's potential earning power. Moreover, it is clear from the evidence that it was indeed possible for married women to work and for the Government to ensure an increase in population: this was rendered possible, no doubt, by the types of social security benefit which were made available to the family. The main difference consequently would seem to be state-insured family policy, as opposed to husband (or primary bread-winner) insured family policy. This difference alone will result in differing situations for the female part-timer as between the UK and France in the area of Social Security rights.

Before going on to look at the content of the laws based on the Beveridge Report, I would like to relate the above specifically to part-time workers. A consequence of the view contained in the Report that married women were not expected to participate in the labour market was, and continues to be, the belief that if married women do decide to do so, then it is for extra money. The earnings made by "the wife" were not considered to form part of the means of subsistence, but were regarded as providing a higher standard of living for the couple. The wife's main work was still to be carried out in the home and her extra work would provide her with "pin-money", for household accessories and/or other luxuries. In other words, the wife's earnings were considered to be what could be called exuberant provision.

In Chapter One, I demonstrated that part-time employment today is the domain of married women. I also indicated how the belief that married women are working for

⁴⁵ This is in direct contrast to what occurred in France over the same period.

exuberant provision is built into employers' demand for "suitable" workers and into the low paid status of part-time employment generally. This belief, therefore, has compounded the description of this type of employment as "cheap" and "secondary" and has aided in the overall under-estimation of part-timers' economic importance for employers. This in turn keeps part-timers low paid.

Equally as importantly, I argue here, it has strengthened the acceptance of the exclusion of this group of workers from Social Security generally. The individual female part-timer's need for social security benefits is claimed to be minimal, as she is still considered to be financially dependent on her husband. Further argument on this point will be made later, but it is to be noted for now.

Social Security Law and NI Insurance Contributions

O'Donovan and Szyszczak argue that there were three main consequences of the Beveridge Report with regard to the content of the legislation which was subsequently enacted⁴⁶. Firstly, wives were treated as dependents in Social Security law; secondly, if a wife was engaged in paid work and chose to pay contributions, she could only pay reduced sums of money and, thirdly, and as a result of the latter point, if a married woman did decide to contribute to the scheme, she would only receive reduced benefits. The Social Security legislation and the rules designed to administer the NIS thus reflected the position taken by the Beveridge Report.

The Social Security Law enacted in 1975 did, however, repeal the exclusion of married women from making compulsory contributions if they were waged, thus placing the level of benefits which they were entitled to on a par with men's standards (what is termed the "normal" standard). Also, more recently, and as a result of SEL (particularly that emanating from the EC framework), a large proportion of the discriminatory elements of Social Security

46 cf. O'Donovan and Szyszczak (1988): p164-5

law have been removed. However, two major factors remain the same. Firstly, the structure of the NI contribution scheme has not changed and secondly, the exclusion of part-time workers from social security schemes, entrenched over the years, continues to persist. Let us consider these two factors together, as they are inextricably linked.

The NIS establishes a minimum and maximum threshold to facilitate the calculations of contributions to benefits, the Lower Earnings Limit (LEL) and the Upper Earnings Limit (UEL) respectively, which are adjusted each year. There is a legal requirement to pay social security contributions on earnings above the LEL up to the UEL, the latter being equal to approximately seven times the LEL⁴⁷. Fixed Class III contributions may be paid by those earning less than the LEL in order to gain qualification for benefit⁴⁸, but there is no legal requirement placed on employers to do so.

Most part-timers are paid salaries which fall below the LEL, which is the lower threshold for compulsory NI contributions. In this way, employers do not have to make payments on behalf of their part-time employees, which saves them money, and part-time employees are not entitled to many of the major benefits, such as sickness benefit, unemployment benefit, maternity pay etc.⁴⁹. Lack of a national minimum wage, lack of union pressure and now, especially, lack of a wages' council⁵⁰ allows employers to keep wages very low⁵¹. According to the Department of Employment Gazette (December 1984) in the year 1984:

47 cf. Oldfield, M. (1985): p4.

48 *ibid.*: p5.

49 It is unlikely that a part-timer would opt to make contributions if the salary fell below the LEL, as this would mean that the take-home pay would be reduced to the point of being negligible. The conflict between levels of pay and entitlement to rights can be seen in the contradiction between TUREA and recent Maternity Pay Regulations, whereby part-timers working over an 8 hour per week threshold have a right to maternity leave (under TUREA 1993), but if they are earning below the LEL they fail to qualify for statutory maternity pay (under present conditions of DSS consultation paper on Maternity Pay).

50 Wages Councils were abolished by s.35 of TUREA 1993.

51 In fact the New Earnings Survey [NES] 1990 records that in 1990 4,300,000 part-time workers in the UK earned less than the Council of Europe's decency threshold for pay [this is equivalent to 80% of all part-timers counted under the rules of the NES sample - the equivalent figure in 1979 was 76%]: cf. The New Review of the Low Pay Unit No.8 Feb/Mar 1991 p12 & p15.

23/4 million part-time employees earned too little to pay a national insurance contribution, 1/2 million more than in 1979.

Two groups of factors can be seen to be operating here in such a way as to exclude part-timers from contributions to Social Security benefits: one at statutory level, the other at a lower market level. A combination of statutory legal factors (the setting of the NI threshold) and market⁵² factors (the setting of the wage) are locked together here in a complex manner, with the result that part-timers are excluded from indirect pay and other state-related benefits.

This process is qualified by two other realisations. Firstly, not all part-time workers are paid below the LEL and so, once again, it is impossible to assert that the principle of non-discrimination between full- and part-time workers does not directly operate at all in this area. Secondly, if Trade Unions wished to apply the principle of non-discrimination here in a collective agreement, they would be hampered by the LEL, ie. the statutory requirement. The immediate recourse a union might have in this instance, if it wanted to ensure the indirect application of the principle, would be to campaign for higher wages for part-timers, thus bringing their wages up above the LEL. However, this is something that a union may be reluctant to do for large groups of women workers⁵³.

Before moving on to the next section, two brief comparisons with France will be given here. Firstly, the above represents a clear example of the importance of the nature of the relationship between direct and indirect pay. Secondly, the importance of the structure of Social Security law to the operation of the principle of non-discrimination is in evidence here. It is clear that, as in France, the level of the Social Security threshold is a crucial factor with regard to the application of the principle of non-discrimination. In France, the level of the threshold was determined by the number of hours worked, whereas in the UK it is

⁵² Economic and social factors.

⁵³ In the previous section on pay, examples were given of cases taken using Sex Equality Law (SEL) which were in effect attempting to apply the principle of non-discrimination to the area of pay. It is to be noted here that cases have been taken under SEL which in effect attempt to apply the principle of non-discrimination to the area of social protection generally. For a discussion of some of these case cf. Luckhaus, L. (1990).

determined by the level of earnings. Summarily, what can be seen here, is that both the relationship of direct pay to indirect pay, and the relationship of the structure of Social Security law to the application of the principle, highlights a similar difficulty for the hypothetical application of the principle in the UK. This difficulty is related to the operation of the principle of non-discrimination between the different areas to which it can be applied.

Pensions

Part-time employees are usually excluded from both the NIS state pension system and the occupational system⁵⁴. The existence of the LEL means that there is no legal requirement for employers to make contributions on behalf of those workers who earn less than the LEL. Similarly and with regard to occupational pension schemes most employers do not include part-time workers in definitions of those eligible to participate: these definitions would include factors such as grounds of age, length of service, perhaps an hours' qualification and quite simply the fact of being a part-time worker⁵⁵. In a survey carried out by the Government Actuary Department in 1986, it was established that some four million workers are excluded from employers' schemes, half of which were part-time workers. The majority of these workers were in fact women⁵⁶.

In the mid 1980s, Land and Ward put forward a case on behalf of the NCCL on the impact of the Social Security Act (1986) on women's rights⁵⁷. They argued that the UK Government was not recognising the large growth in part-time employment in its statutory law. They located an *"important, but less surprising omission"*, namely the lack of discussion in the drafting stages on the needs of part-time employees, who they argued now constituted "a

54 For a discussion on the differences between State and Occupational pension schemes, cf. TUC (1981): p25.

55 cf. op. cit. note 10: p53. These factors are usually ILM-related factors, cf. Chapter One of the thesis for a discussion of these factors.

56 *ibid.*: p53.

57 cf. Land, H. and Ward, S. (1986).

fifth of the workforce"⁵⁸. The 2.75 million women in part-time jobs who earned less than the LEL were not even referred to in the White Paper⁵⁹. At a moment when the number of part-time employees was growing, it seemed incredible that such an important trend in employment growth could be ignored in statutory Social Security legislation by mistake.

The proposals comprised two main intentions. Firstly, they were concerned with promoting occupational pension schemes at the expense of state schemes. This can be seen as part of the deregulation and privatisation processes. Secondly, they were concerned with maintaining the concept of a primary male worker as the norm, at the expense of the secondary female worker. In particular, the contemporary "best twenty years" formula which had been used to calculate the level of the SERPS (State Earnings-Related Pension Scheme) would be replaced by one which calculated the average earnings over a person's working lifetime, omitting those years when that person was engaged in full-time child-care⁶⁰. Hakim's study, discussed at length in Chapter One, detected a bi-modal working pattern for women. There was a tendency, on leaving the labour market, not to be involved in full-time child-care for the rest of one's life, but to return to the labour market and be employed on a part-time basis. The change of formula for the calculation of the pension would have a profound effect on these groups of women, lowering the level of their benefits considerably⁶¹. It does in fact make sense financially not to return to the labour market and work part-time, in order to accrue a higher pension under these rules. Here, as in other areas, therefore, part-time employees are conceptualised as "married-women-dependents", dependent on a husband's earning power.

58 *ibid.*: p8. Land and Ward's argument is intent on showing that this legislation is inherently sexist as it is structured on an assumption that women's economic security can be maintained through their husband's benefit entitlement. This assumption derives from assumptions made by the Beveridge Report, cf. *op. cit.* note 41.

59 *cf. op. cit.* note 57: p41.

60 *ibid.*

61 *ibid.*: p38.

Conclusions

This chapter focused on the situation of the part-timer without the statutory enactment of the principle of non-discrimination. Following the format adopted in Chapter Three, this was done by looking at three main areas of working life: miscellaneous rights, pay and terms and conditions of employment. The chapter highlighted the main consequences of the lack of a principle of non-discrimination in public statutory law and, in some instances, indicated potential difficulties for its hypothetical implementation.

The first finding I made was that the pressure of Trade Unions to campaign for part-timers' rights became more important without the statutory enactment of the principle. This is a relatively straightforward and unsurprising conclusion, but nevertheless, the importance of unionisation to the market value attached to part-time employment is once again highlighted by this result. Additionally, the importance of Trade Unions to part-timers interacts with Trade Unions' own need to defend themselves and their members. Indeed, it can be argued that the propensity for Trade Unions to campaign for part-timers increases as part-time employment grows and as Trade Unions ultimately get involved with part-timers' rights. This highlights a further and important point on the difference in emphasis between the UK Government's and the Trade Unions' response to part-time employment. Trade Unions will become more active as part-time employment increases. The UK Government has been concerned with reducing the role of Trade Unions. Therefore, undermining the position of Trade Unions can in fact be seen as part of UK Government Part-Time Employment Policy⁶².

The second finding concerned the hypothetical problems of operation of the principle of non-discrimination between the areas to which it could be applied. Importantly, there was much overlap of the areas to which various laws were being applied, so that the potential operation of the principle of non-discrimination would incur similar difficulties to those

62 This point is examined further in Chapter Five.

connected with its operation in France. For example, the general problem of the application of the principle between the areas of direct and indirect pay was evidenced in the case of the level of wage and access to social protection in the form of the National Insurance Scheme.

Finally, the examination of the structure of the laws now affecting part-timers in the UK indicated that, as in France, each law relied on a certain conception of labour market functioning which differed from the understanding made by the principle itself. For example, the structure of the EP(C)A determined the rights which part-timers could claim and was based on primary labour market related concepts. The way SEL was structured was vital to the application of the principle in the area of pay (although not demonstrated directly here, the structure of SEL is in fact important to the application of the principle in all three areas). Once again, this law was based on an understanding of labour market functioning which was seemingly at odds with that made by the principle - this understanding was explored in detail in Chapter Two. Finally, the structure of Social Security law, vital to indirect pay and social protection awarded part-time workers, was shaped by national Family Policy - Family Policy itself being based on a certain understanding of women's potential employment behaviour. This had a specific effect on the situation of part-timers as women, and especially as married women. Unlike in France, UK Family Policy operated to the disadvantage of the part-timer as a woman. The main difference arose from the expectations made by the policy in question of women's potential earning power within the labour market. Similarly, however, such expectations seriously affected the potential operation of the principle of non-discrimination in the areas of indirect pay and terms/conditions of employment.

CHAPTER FIVE - "FRENCH AND UK APPROACHES TO PART-TIME EMPLOYMENT: DIFFERENT POLICIES, DIFFERENT MARKETS?"

Introduction

Part III of the thesis has been concerned so far with exploring a specific way of regulating part-time employment, through the enactment of the principle of non-discrimination. In Chapters Three and Four, certain common findings were made in relation to the functioning (or potential functioning) of the principle. A question which arose concerned my understanding of the intention of the principle as a measure to redress labour market failures. I found that the principle (as it operated in French Law) did not appear to be able to re-evaluate all the working circumstances of part-time employment in a comprehensive manner. This has lead me to ask further questions: does this limitation of the principle suggest a weakness in its form or is it the case that the principle is not being used to achieve this particular goal? Does its enactment into law signify the existence of other policy goals which have so far been unmentioned? This chapter will explore the aim of the principle in more detail by examining Governmental rationale for both its enactment and non-enactment into statutory law. I will do this by looking at overall national Part-Time Employment Policy.

One of the main findings of Parts II and III is that different laws have different conceptualisations of labour market functioning, which they rely upon to achieve their goals. With regard to the principle of non-discrimination, it was seen in Chapters Three and Four that the problems highlighted in relation to its successful application in part stemmed from this very fact. For example, the conceptualisation of the market by French Social Security law was at times at odds with the conceptualisation of the market by the principle of non-discrimination. In the first case, the law only recognised primary market behaviour, whereas in the second case, the law was attempting to recognise secondary market behaviour. Similarly, residues from previous policies not related specifically to part-time employment directly affected the operation or indirect application of the principle. It is thus crucial to any

understanding of Part-Time Employment Policy to consider the conception of labour market functioning on which it depends.

This chapter will consequently sort out the link between French and UK Government Part-Time Employment Policy goals and the policies' conceptualisations of labour market functioning, by looking at Government rhetoric on the expected effect of such policy on part-time employment. In particular, the relationship of the policy in question to social protection and economic flexibility goals will be explored. The Chapter will highlight the difference in approach to labour market regulation between the French and UK models of Part-Time Employment Policy.

Finally, this Chapter forms the background for the discussion of European Community (EC) Part-Time Employment Policy and its understandings of the creation and functioning of the internal market. As EC Member States' positions, differences in French and UK approaches will be reflected in discussions at EC level on the need for an EC policy.

Part-Time Employment Policy

Conceptualisations of Part-Time Employment

The nature of a particular Part-Time Employment Policy is linked to the conceptualisation of part-time employment in the wider context of the understanding of the character of the labour market. In order to fully grasp the aim of a specific policy, it is consequently important to explore its conceptualisation of the employment to which it is being applied. There are in fact a number of different ways of conceptualising part-time employment, which I intend to define before examining French and UK Part-Time Employment Policy themselves¹.

¹ Some of these views are in fact contained in an European Community Commission Report compiled in the late 1970s early 1980s on part-time employment, cf. Com(80)405 final and Annex V/1048/79-EN. Links with these views will be indicated where appropriate in Chapter Six in a full discussion of this Report.

The first way of thinking about part-time employment would argue that the market value accorded part-time employment is a "free and fair" value and that if part-time employment is a low paid employment this is the result of the free functioning of the market. This view would consider the level of pay to be linked to the level of skill. Low pay would be considered a neutral economic feature inherent in the nature of part-time employment. This understanding of part-time employment may indeed stem from the belief that it is a secondary employment and that, consequently, the setting of the wage is more likely to reflect the neoclassical equation of skill to value. It might, therefore, be reluctant to recognise that part-timers' wages are artificially determined. In particular, it would not recognise that part-timers' wages are artificially set by a complex system of job evaluation, which itself is dependent on specific factors, such as "skill specificity", "on the job training", "custom" and "unionisation"². This conceptualisation of part-time employment can be found in the view expressed by the UK Government. It is found in the rhetoric of UK Government discourse which argues that without low pay and a low level of social protection, part-time employment would not be created³. Thus, according to this understanding, part-time employment can only ever be low paid employment. As will be seen, UK part-time employment policy is based on this understanding of part-time employment.

A second way of thinking about part-time employment would assert that part-time employment is employment which is undervalued by the market. Its low pay status would be questionable and rectifiable by some artificial means, notably law. This view would perhaps have a concept of the market as being segmented. This view would entail an acknowledgment of the economic importance of part-time employment to the employer/industry/economy and see this as a main reason for its creation. It would consequently argue that part-time

² These are in turn structured factors: cf. the model of "engendered segmentation" in Chapter One of the thesis.

³ This view might have an understanding that "sexism" could be a possible market distortion [market = fair and free area], but would expect Sex Equality Law to be able to deal with this, ie. if part-timers' low pay is due to sexism, then this is already covered by law.

employment did not have to be low paid in order to be created, economically speaking⁴. The French Government's argument, as we shall see, fits closely with this view.

A third way of thinking about part-time employment is not so much concerned with the general labour market process, but focuses specifically on women's employment. It would not question "why" women choose to work part-time, but would start from the fact that they do. It would consider part-time employment as employment being created for women with its hourly organisation being of benefit to women. This approach would probably argue that the low pay and low social protection status are the features of the employment which do not benefit women and that these should be changed. Within this view, therefore, there is a twofold belief that part-time employment can exist without being low paid and that the low pay status must be rectified if women are to be valued within the market.

A fourth and final way of looking at part-time employment is concerned with women's role (and potential role) both in the labour market and in the family. This view would argue that neither the hours of work nor the secondary status of part-time employment are of benefit to women because both these features lock women into their secondary status in society. In other words, part-time employment offers women a false sense of liberation from their traditional role in the family and simply transfers their oppression in the home to oppression in the market⁵. This approach may argue two things: either, firstly, that the nature of part-time employment is in reality determined by the supply of labour available and, therefore, if the supply of labour changed this would change the nature of the employment, or that, secondly, the pre-selected aspect of part-time employment is so entrenched that part-time employment can only really continue as a form of employment for women, ie. that even if the supply of labour were to change, the nature of part-time employment would be slow to respond. In the first instance, this view would be against the creation of part-time

4 But this view could see that cost factors are important to the creation of part-time employment.

5 cf. The Paris Committees's analysis of part-time employment, in relation to the proposed European Community draft directive on part-time employment (Com(81)775 final), presented to the Conference of the European Network of Women on 9-10 February 1985 Paris.

employment for women alone and would perhaps encourage its creation for men as well, by looking at factors which are both internal and external to the market. In the second instance, it would be against part-time employment altogether⁶.

These different approaches raise questions concerning the very nature of part-time employment itself. Can it only mean a low paid job for women (who hold non-market domestic responsibilities as well) or can it mean something else? And if it can mean something else, is this primarily dependent on the supply of labour available? This can be regarded as a supply and demand question, asking simply if the supply of labour had been different, would part-time employment exist at all today in the way it does? Are there other ways of effecting the process of pre-selected part-time employment, such as through law? It is apparent that the way in which the nature of part-time employment is conceptualised will be of great importance to the desired effect of a particular Part-Time Employment Policy.

This is evidenced when the possible effects of the enactment of the principle of non-discrimination are taken into consideration. Does its enactment involve an intention of reducing the number of part-time jobs, or of reducing the number of part-time jobs for women (if the two are seen as separate) or is it a question of the elimination of the low pay (and low protection) status of part-time employees? Moreover, is it possible to eliminate the low pay status of the job, without causing a reduction in the overall number of jobs being created?

Other questions can be worded more positively: is there perhaps within the labour market policy an intention to encourage the creation of part-time employment for men, or the breaking down of employment barriers between part- and full-time employment to allow groups (or individuals) more freedom of movement and thus alleviate the static concentration of certain groups in this employment? Would this more positive approach require additional

⁶ *ibid.* "Nous sommes contre le travail à temps partiel...Au lieu d'être un privilège, le travail à temps partiel est en fait un piège pour les femmes" [We oppose part-time work... Rather than being a privilege part-time work is a trap for women.] Interestingly, although this Committee took this very strong position in relation to part-time employment, the workshop in which they participated conceded that if the creation of part-time employment could not be prevented, then the workshop was totally in favour of granting part-timers equal rights with full-timers, ie. a position taken by the second and third views described above.

legislation beyond the enactment of the principle of non-discrimination? More pertinently perhaps, does this approach involve a certain view of the labour market as one being segmented and not free? The next two sections of this chapter will proceed to answer some of these questions, by examining two different part-time employment policies - the French model and the UK model.

The French Model

French Part-Time Employment Policy forms part of a more general approach to market regulation. In the early 1980s, the new Socialist Government coming to power was keen to implement a general policy of labour market regulation, based on a policy of redistribution of working time. It was understood that the high level of unemployment could be reduced by a more equal sharing of employment. However, the recession of 1982/3 soon forced the Government to re-think the redistributive element and focus the policy on the concept of flexibility - it was believed that increased flexibility in employment would have a direct positive effect on the increased levels of unemployment, through the creation of new jobs⁷.

The model of Part-Time Employment Policy was born during this period: it consists of a collection of laws enacted under two different Governments, with slightly differing aims. In December 1980 - January 1981, under the Giscard-Barre Government, two laws were enacted which were focused on employer flexibility⁸. Under the Mauroy Government of 1982, two more regulations were adopted, this time with the emphasis on individual rights for part-time workers⁹. These laws were in addition added to during the mid-1980s under a more conservative Government. Consequently, French Part-Time Employment Policy's central feature is a tension between "flexibility" and "protection". More specifically, the model is aimed

7 This is a view held by the European Commission at this time as well: cf. the Commission opinion in op. cit. note 1.

8 cf. op. cit. note 5: p19.

9 *ibid.*

at encouraging "flexibility" from the employers' point of view, whilst simultaneously trying to reduce the negative effects of segmentation from the employees' point of view - it is to be recalled that in Chapter One of the thesis it was found that employer flexibility is achieved through the process of segmentation, which in turn resulted in the artificial depressing of wages, the setting up of segmentation barriers, thus affecting socioeconomic mobility, and labour market disadvantage. Although, there is an element of the model which is still concerned with the more even distribution of working time, the emphasis of the model is clearly on "flexibility". The overall aim of the policy is thus seen in the encouragement of flexibility, for the purposes of job creation and the reduction in unemployment.

There are two main parts to the policy. The first is the enactment of the principle of non-discrimination between full- and part-time workers - the form of the principle was explored in detail in Chapter Three. The second is the enactment of specific rules which regulate worker movement in and out of part-time employment. These will be considered later on in this section. First of all, however, I intend to look at why the French Government chose the particular form of the principle of non-discrimination which I have described in Chapter Three.

In the early 1980s, the French Government, on considering the form of a Part-Time Employment Policy, believed the best way to approach this was through the adoption of the principle of non-discrimination into statutory law. In the first instance, an essentially humanitarian argument was advanced claiming that part-time employees must be given equal rights with full-timers on grounds of fairness. Choosing part-time employment, it was argued, would be considered a disadvantaged option to the worker if in so doing he or she was expected to forfeit employment rights or protection. The Government, therefore, established a level of protection which it considered would be acceptable to the worker. A level of expected fairness was thus enacted in statutory law.

It was also seen in the Government's desire to regulate this employment, that the Government was very keen for workers to choose to work part-time. The incentive for the worker would be an equal level of rights or pay and a more flexible working lifestyle. It is interesting to note that although in much of the debate the Government refers to the potential part-time employee in neutral terms, it is clear that it is women whom they have in mind as benefiting from this new lifestyle¹⁰. At this level, therefore, part-time employment is conceptualised as being of benefit to the worker (gender neutral), but only if it is adequately protected by employment law. Flexibility is, in part, defined in terms of worker choice.

However, by the same token, the enactment of the principle must not have as its result the discouragement of employers from opting for part-time employment. The French Government consequently regulated the application of the principle in such a way as to ensure that this would not occur. This strategy is explained by Teyssié, in his two articles on the 1981 and 1982 pieces of legislation¹¹. Here, he highlights a fundamental intention of these laws, which is to ensure "la neutralité" of part-time work. What does this mean? Ensuring the neutrality of part-time employment does not mean the prevention of the creation of part-time employment, but an attempt to minimise, to the point of removing, any negative effect of having part-time workers in one's establishment. It must be emphasised here that the removal of the effect means the removal of any additional cost, which the creation of this employment may have on the employer, given the existence of the principle of non-discrimination. The creation of this employment is thus to be encouraged by ensuring that it is to be no more expensive to the employer than full-time employment would be.

Teyssié argues that recourse to part-time employment would have been considered disadvantageous for employers if in so doing they noticed an abnormal increase in their social

10 cf. Halpern, M. (1981).

11 cf. Teyssié, B. (1981) and (1982).

or fiscal costs¹². Teyssié argues that the method of calculation of social costs which existed under Social Security law (before the enactment of the 1981/82 laws) needed to be altered in order to encourage the increase in part-time employment¹³. The threshold of total numbers of employees, which had been used to calculate social security costs would cause employers the severest financial burdens, thus creating obstacles which could stem the growth of part-time employment. The only way to prevent this was to somehow "neutralise" part-time work.

The criterion adopted by the 1981 law and retained in the 1982 regulation is one which bases the calculation of costs on the length of working time (rather than on the aggregate remuneration of employees as some suggested) thus, in effect, "losing" numbers of part-time workers. The French parliament was anxious to ensure strict neutrality of part-time employment and initially decided to proceed as follows with regard to the method of calculation: the numbers of workers would be calculated by dividing the total number of hours registered in employment contracts by the legal working time (ie. 39 hours) or the normal working time of industry, if the latter is lower¹⁴. The clause "normal working time" was deleted by the 1982 regulation, so now all use the 39 hour regulation. This means that an employer who employs 10 full-time workers, working a 40 hour week and 15 part-time workers, working a 20 hour week would, under the new rules, pay contributions for 17 workers. Under the old rules, the employer would have had to pay contributions for all 25 workers. Here, it can be seen, therefore, that the effect of the enactment of the principle, which may have caused extra costs to employers, is minimised by an adjustment in the social security laws.

12 cf. Teyssié (1981): p526.

13 *ibid.*: p530.

14 cf. Code de Travail: Article L.212-4-4.

So, it is apparent that the Government was keen to encourage both employers and employees into part-time employment. Lucas¹⁵ recognises this twofold strategy in the form of the principle of non-discrimination. On the one hand, the application of the principle is adjusted so as to encourage businesses and industries to use part-time working relationships to increase flexibility and thus cope with greater workloads and, on the other hand, the principle is enacted to encourage any worker who wishes to re-organise his or her working time through a reduction in the number of hours to do so in the knowledge that he/she would not lose all of his/her rights. Lucas considers the 1981 law to be a compromise: an attempt at balancing the granting of rights to workers against the cost of those rights to the employer. The emphasis is seemingly on flexibility for both employers and employees, removing financial burdens from the former whilst retaining basic rights for the latter¹⁶.

French Part-Time Employment Policy is consequently based on a positive desire to create more employment. This is considered achievable through the encouragement of flexibility, by the removal of certain costs for employers, and through the removal of the effects of segmentation and market undervaluing of part-time employment, by granting part-timers equal rights to full-timers. Such a strategy thus encourages the creation of part-time employment for reasons other than simple cost-cutting for employers, given that some level of employer labour costs remain intact.

From the point of view of the part-timer, this strategy is not without its weaknesses, however. It is apparent from the way in which the French Government went about ensuring the enactment of the principle of non-discrimination that the emphasis of their policy is firmly placed on reducing employers' costs, sometimes to the point of undermining the protection aspect of the principle. For example, although the content of these laws expresses a desire to guarantee protection of part-time workers by offering them the same benefits and conditions

15 cf. Lucas, M. (1981): p535-537.

16 This is particularly apparent in the rules governing the movement in and out of part-time employment. These are discussed later on in this chapter.

and pro rata payments as full-timers, the wish to reduce costs results in a lessening of the protection of part-timers in respect of representation rights. This reduction in the level of representation occurs due to the fact that as a part-time employee is only considered to be a half/quarter of a unit in the company, this has a direct effect on the obligation of the employer to Representative and Health and Safety Committees, the establishment of which is determined by the number of workers in the firm being over a certain threshold¹⁷. Additionally, the number of representatives allowed depends upon the number of employees in the company. This means that choosing to work part-time involves choosing a reduction in representative and health and safety rights. Moreover, this is not expected by the full application of paragraph 8 L 212-4-2 of the Labour Code, applying the principle of non-discrimination in this area, which does not qualify the application of these rights to part-time workers by the number of hours' worked¹⁸. In order to fully apply paragraph 8, therefore, it could have been feasible for the quota systems for threshold calculations to be revised, something which was not done¹⁹.

Another example of the subordination of the protection aspect of the principle of non-discrimination to employers' flexibility requirements is the decision not to make adjustments in the granting of social security benefits. Much time was spent adjusting the laws of employers' contributions to social security benefits to ensure continued and increased option by employers for part-time employment. Other aspects of Social Security law remain unchanged, however, and these cover the granting of some benefits in practice to part-timers who work under a certain number of hours a week. This organisation of the application of the

17 The number must be 50+ employees, cf. Siméon et Moquet Borde (1992): sections 12-61 and 12-159.

18 cf. Paragraph 8 as described in Chapter Three.

19 This amounts to a further indication of the difficulties of the operation of the principle between the areas to which it is applied.

principle clearly places an emphasis on the economic (employer flexibility) side of things, rather than on the social protection (worker's rights) side of things²⁰.

Summarily, the enactment of the principle of non-discrimination in French statutory law has a very specific function in relation to part-time employment. It is to be remembered that there are in fact other aspects of the part-time employment as a segmented employment which may well be undesirable, but which are left untouched by the principle organised in this way. I refer here in particular to the concentration of women (and married women) into part-time employment and the lack of employee flexibility, both of which are brought about by the segmentation process. In France, the undesirability of part-time employment to women was not overtly mentioned in early 1980s debates²¹. It was "understood" that there was a latent demand for part-time employment by women and this was not overtly questioned. Part-time employment was not conceptualised as being harmful or oppressive to women.

But, although an active policy discouraging the concentration of women in part-time employment was not the one adopted by the French, nevertheless, there was some effort made to encourage movement between part-time and full-time employment. A policy in the form of breaking down segmentation barriers was thus adopted in some form.

A key to understanding why the movement in and out of part-time employment was to be regulated is found in the report preceding the text of edict no.82-271 of the 26th March 1982. In this, it was stated that the aim of the following piece of legislation, which was the regulation of part-time employment, was to ensure that part-time employment would not become a marginalised employment. Moreover, the expression lent to the nature of part-time work as a concept was one which promoted a consideration of this form of employment as

20 This is further evidenced by the ruling on overtime payments, which is discussed in detail in Chapter Three. As a result of non-payment of overtime for part-time employees, employers can make the most of a flexible workforce without holding the financial responsibilities.

21 cf. op. cit. note 10.

something in and out of which employees would move, whilst still considering full-time employment as the ultimate goal. This is explained as follows:

*It is conceivable to perceive a form of struggle for full-time work within the nature of part-time work.*²²

To this end, Article L.212-4-5 contained certain rights of passage between full- and part-time work. Paragraph 1 of this Article granted rights to those part-time employees wishing to take up full employment and to those full-time employees who wished to take up part-time employment in the same establishment (ie. that they wish the position to be in the same establishment), giving these workers priority rights in the allocation of a job within their professional category, or an equivalent one. There was a legal responsibility for the employer to furnish a list of available suitable positions to his/her employees to this end. Priority of passage does depend on there being an available job for the employee concerned, so that the success of this whole provision in respect of the part-time employee who wishes a full-time job remains somewhat vague.

This conception of part-time employment as one which involved worker flexibility is further upheld in the understanding that part-time employment can only be practised on a voluntary basis²³. This is expressed in the text of the law itself:

*The refusal to carry out a part-time job by an employee is not considered to be either an offence or a reason for dismissal.*²⁴

Article L.212-4-2 is entitled "Voluntary Employment" (Travail à Temps Choisi). In theory, according to this Article, it would be quite difficult for an employer who wished to restructure her/his industry to create part-time jobs out of full-time jobs unless the workers employed in the full-time employment wished to work part-time. Practically, however, if all

²² Qu'il est concevable de voir dans le temps partiel une modalité de la lutte pour le plein emploi. cf. Teyssié, B (1982): p.404.

²³ cf. Ordonnance No. 82-271 Du Mars 1982 relative au travail à temps partiel - Rapport Au Président de la République.

²⁴ Le refus par un salarié d'effectuer un travail à temps partiel ne constitue ni une faute ni un motif de licenciement. Paragraph 7 of Article L.212-4-2.

those who worked full-time refused the offers of employment, the employer could make them all redundant and seek to employ new workers. The employer would then face a strict set of rules covering collective dismissals of employees, probably resulting in him/her having to furnish the Departmental Director of Labour, the Workers' Representative Committee and Personal Delegates with the employers' plan on employment conditions detailing reasons for restructuring the establishment. If insufficient reasons exist for dismissal on economic grounds, then the employer might end up having to pay out large sums of money in indemnities.

But, the possibility remains for the employer to forge ahead in any case, due to the fact that much of the communication required between the employer and the representative bodies is purely on a consultative basis. More importantly, exemptions in the case of restructuring industry do exist, if the employer faces severe economic difficulties. This means that in practice a full-time employee not wishing a part-time job may be forced to take one when confronted with the reality of an unfavourable economic climate²⁵.

Finally, an interesting rule which relates to the whole question of conceptualisation concerns the use of part-time work in connection with the birth of a child. Under articles L.122-28-3 and L.122-28-1(2) of the Labour Code, an employee, male or female, may request the reduction of their working hours by 50% on the birth or adoption of a child for a period of up to two years. Upon the expiration of the agreed period, the then part-time employee is entitled to resume her/his previous job, or a job which is similar thereto, at a salary level which is at a minimum the equivalent to the previous salary. Once again, however, the availability of a full-time job in practice is uncertain.

Summarily, French Part-Time Employment Policy is based, for the most part, on the application of the principle of non-discrimination between full- and part-time employees. I argued that the form of the principle adopted results in the subordination of the protection

25 cf. Savatier, J. (1988): p439-440.

aspect to the goal of flexibility and employment growth. This was seen in particular in the non-adjustment of certain rules which offer protective measures to part-time employees. In other words, the protection aspect of the principle was organised in such a way as to ensure the creation of part-time employment. According to the French, therefore, the principle of non-discrimination is seen to be able to deal with both the economic and social aspects of part-time employment. The principle of non-discrimination is used to encourage flexibility, ie. as an "equality" measure which is directly linked to the goal of flexibility. Moreover, it is seen as prerequisite to this end. Accordingly, therefore, French belief is that part-time employment can be created with the enactment of this principle and, indeed, that its continued creation depends on the enactment of the principle.

However, with regard to the notion of socioeconomic mobility, additional laws were needed to ensure worker flexibility. This highlights an important realisation for the thesis. The re-evaluation of part-time employment, in a narrow sense, simply refers to the re-adjustment of the level of pay and social protection. But, there is further argument to be taken on board which considers part-time employment as a segmented employment. According to this argument, dealing with the effects of segmentation does not only mean dealing with the re-accordance of value. The artificial adjustment to the process is not enough to tackle the problem of engendered segmentation. This can only be achieved through the breaking down of other aspects of segmentation, such as restricted socioeconomic mobility and labour market disadvantage for certain groups, eg. women. Such measures would have a positive effect on "sexism", because as more men are encouraged to enter part-time employment, so the nature and conceptualisation of it will change (this is seen to be slowly happening in France). This means, that in a broader sense, the re-conferral of value would include the tackling of all three aspects of segmentation mentioned in Chapter One.

The UK Model

UK policy on part-time employment also forms part of a more general labour market policy. This policy is one of de-regulation of the labour market. According to this policy, job creation is stimulated through the removal of unwanted and harmful barriers, which prevent the free movement of market forces²⁶. A high level of social protection is considered to be such a barrier. The enactment of social protection is thus presented as something which is opposed to the goal of flexibility. Employers are to be encouraged in their flexibility strategies through a policy which is against the implementation of any "artificial statutory" law which would grant part-timers *pro rata temporis* rights with full-time workers. So, the UK model, as the French model, is specifically aimed at encouraging flexibility. The main difference between the two is that the UK model does not attempt to remove any negative effects of segmentation - in fact, the process of segmentation is implicitly denied by Government rhetoric.

At one level, the UK Government seem to consider the principle of non-discrimination as having an artificial impact on what they call the "free functioning" of market forces and the role of free collective bargaining within this. The market is considered to be a free one with the level of pay being set fairly according to the neoclassical equation. According to this view, the principle is perceived of as granting workers an unfairly high level of pay compared to what their job is actually worth. The enactment of the principle is seen as an intervention in the private contractual arrangements between the worker and the employer: an intervention in fair market processes. This argument relates to their general policy of de-regulation, where non-intervention of Government is upheld and instead levels of pay etc. are left to the two sides of industry to determine²⁷.

26 cf. "Building Businesses not Barriers" (1986); cf. Pollert, A. (1990): p67.

27 There is in fact a contradiction in the government's argument here - during the 1980s, the government reduced the powers of the Trade Unions whilst simultaneously campaigning for the rights of the two sides of industry to determine the levels of pay etc.. The government have done much to reduce the ability of workers to argue for rights, whilst at the same time claiming that it is up to workers to argue for rights.

At another level, the UK Government pursue a further argument in which the principle of non-discrimination is discussed in terms of costs: these costs seem to include indirect labour costs, such as those resulting from social protection and also administration costs. This argument has its own logic. Social protection of the part-timer, it is argued, will incur additional costs, which must be met by companies and that, as a result, employers will not be able to afford part-time employment. Consequently, there will be a reduction in part-time jobs and job opportunities. An enactment of the principle of non-discrimination is accordingly presented as something which will prevent the creation of jobs. This position has been argued on many occasions and is perhaps best explored by looking at a recent case taken against the Government by the Equal Opportunities Commission, *Regina v Secretary of State for Employment ex parte EOC*²⁸.

The case *Regina v Secretary of State* was taken by the EOC on behalf of a Patricia Day under Sex Equality Law (SEL). This case in fact provides us with another example of an attempt to apply the principle of non-discrimination between full-and part-time workers using SEL. In this instance, the EOC were attempting to apply the principle of non-discrimination to the Employment Protection (Consolidation) Act (EP(C)A) in respect of the right not to be unfairly dismissed, the right to unfair dismissal compensation and the right to statutory redundancy pay. The qualifying periods for these rights as set by the EP(C)A are two years for workers who work over 16 hours a week and five years for workers who work between 8 and 16 hours a week. As the majority of workers who work between 8 and 16 hours a week are women, a claim was made that these part-timers were being indirectly discriminated against on the grounds of sex.

The Government's defence against such allegations was made under the "objective justification" test. It was agreed that some aspects of the qualifying periods were indirectly discriminatory against women, but these were justified in the following manner:

28 cf. *Regina v Secretary of State for Employment ex parte EOC* IRLR Queen's Bench Divisional Court (1991): 493, and IRLR Court of Appeal (1993): 10.

*The Secretary of State ... objectively justified the continuation of qualifying thresholds on the basis that a reduction in them would adversely affect the employment opportunities available for part-time work, and in particular for women who want such work.*²⁹

*The evidence submitted on behalf of the Secretary of State [was] that legislation to dispense with the qualifying thresholds would lead to an increased burden on employers and therefore to a reduction in part-time jobs available to those who want them... The administrative burden of organising part-time employment of individuals [was held to be] relatively greater than full-time employment.*³⁰

The Government's argument in this case was the "costs argument" described above. The objective of Government policy was described as enabling the creation of as much part-time employment as possible. The means of achieving this objective would be the maintaining of the EP(C)A qualifying period. If this threshold were equalised, it was argued, then employers would not create part-time jobs, but would engage full-time workers. Thus, the objective would not be realised.

This "objective justification" was upheld by the Queen's Bench Divisional Court. The Queen's Bench Divisional Court found that the Secretary of State's costs' argument was "inherently logical"³¹. The Court of Appeal rejected the complaint on the grounds that the EOC did not have *locus standi*. Lord Justice Dillon dissented on this point and went on further to question the Government's objective justification. There are three main observations which I would like to make about these judgments, before going on to consider the costs' argument in more detail.

Firstly, the Government did not argue in this case that its objective was to create part-time jobs which met the requirements of the employers. The need for part-time employment was in fact presented as a need adopted by the Government on behalf of women. Can it be that employers will only create part-time employment because women need it, and that there is no other need for it other than that it is cheaper than full-time employment? All this seems

²⁹ cf. *Regina v Secretary of State for Employment ex parte EOC* IRLR (1991): 494. (Queen's Divisional Court).

³⁰ *ibid.*

³¹ cf. *op. cit.* note 29: p494.

very unlikely. It is far more appropriate to understand this justification as a denial by the Government of employers' economic demand for a particular working-time structure, so that the Government may justify its own policy of maintaining a low level of social protection. The justification implies that if part-time employment became more expensive due to "artificial costs" then employers would utilise full-time employment instead. There is an overt argument here that part-time employment is being created for women, because they "need" it. There is a covert argument that it is being created because it is cheap - an implied policy of cheap labour for women³².

The second observation is that the Secretary of State's "objective justification" was not based on any evidence whatsoever. This is one of the reasons why LJ Dillon dissented in the Court of Appeal. In fact, as LJ Dillon pointed out in the summing up, there is evidence which supports the opposite view: for example, changes in qualifying thresholds have been made recently in Ireland and this has not resulted in a decline in available part-time jobs. Indeed, the findings of Chapter One of this thesis clearly point to economic needs for the use of working time on a part-time basis, for example in the Services' Sector.

The third observation concerns the notion of pre-selected part-time employment and the "objective justification". The question I am asking here is, even if the Secretary of State's justification is held to be true, why is it not held to be one based on sexist assumptions about women? If part-time employment, as opposed to any other form of employment, is being created purely because it is cheaper than full-time employment, then the creation of this type of part-time employment is surely based on assumptions about a "suitable" supply of labour. As we have seen, these assumptions are abstracted from women's past employment behaviour: the abstraction is enabled by sexist ideology. The "objective justification" test here believed that the costs argument was true. But, the test was also unable to recognise that what

³² This is surely against the EAT ruling in *Jenkins*, cf. *Jenkins v Kingsgate (Clothing Productions) Ltd*, EAT (1981) IRLR 388 et seq..

it believed was true, was structured with sexist assumptions about women as "suitable workers". The failure of the test is once more evidenced by its focus on the "causes" doctrine.

Accordingly, the test was unable to locate the hidden sex discrimination in the means for achieving the goal of job creation. As the test operates around an either/or scenario, it not only wound up supporting the Government's costs' argument, but, moreover, it condoned this argument as one which was not sexist. The failure of the part-timer to show that there is sex discrimination occurring in the labour market to her detriment is not automatically attributed to the failure of the law. In fact, it allows for a complacency amongst employers (and the Government) that the situation of part-timers is legal and therefore respectable. A denial of their economic worth by SEL once again aids in the acceptance of their exclusion from a decent level of pay and protection rights.

Before drawing any further conclusions, let us re-consider the Government's cost argument, which contends that the higher the "costs" to employers, the lower the level of job creation. The first part of this argument is that the social protection of part-timers will bring with it additional costs. Two points can be made in connection with this. Firstly, there is a counter-argument (based on calculation in some cases) that this argument is an exaggeration. This argues that additional costs incurred would be minimal or at least that the Government's estimates of the costs involved are highly exaggerated³³. The second counter-argument is not concerned with exaggeration, but states that it is possible to ensure that potential additional costs could be kept to a minimum by changing the structure of NI schemes³⁴. This second argument adopts a position which is similar to the French position, namely that it is possible to achieve flexibility through protection by adjusting cost variables.

33 cf. The House of Lords' Select Committee Report (1981-82): ppxiv-xv.

34 cf. op. cit. note 33: pxv, where the Committee argued that the increase in cost might be alleviated by a change in the current NIS; cf. op. cit. note 33: pxvi on the inflexibility of the NIS; cf. The House of Lords' Select Committee Report (1990-91), in which a similar opinion was expressed by the Committee on changing the NIS.

The second part of the Government's cost argument suggests that additional costs for employers will result in less part-time employment. Again several points must be made. Firstly, many employers do not cite low labour costs as the main reason for recourse to part-time employment. Secondly, many employers, on answering this precise question, assert that they would maintain a policy of part-time employment even with extra cost³⁵. Thirdly, some employers already have this principle in operation and still manage to create part-time employment. Finally, if the NI scheme were adjusted it is even more unlikely that there would be a high reduction in part-time jobs³⁶.

The UK Government is not at all keen to recognise the possibility of making adjustments to any cost variables in order to enact the principle of non-discrimination without causing (potential) job loss. But, Conservative Governments of the past have not been totally against the concept of making adjustments to laws in order to make part-time employment cheaper for employers. In 1972, for example, under Heath's Government, the Selective Employment Tax law was removed³⁷. Under this law, employers had to pay tax per employee irrespective of the number of hours worked. Its removal thus aided in the growth of part-time employment. So, a strictly non-interventionist position to enhance employee protection is specific to recent Conservative Governments' lack of desire for the protectionist aspect of this principle.

This is further evidenced by the contents of a White Paper of May 1986 entitled "Building Businesses not Barriers"³⁸. Morton writes about this paper in the following way:

*The White Paper is described by the Government as an attempt to help businesses by removing "unnecessary regulations."*³⁹

35 cf. CBI opinion in the House of Lords' Select Committee Report (1990-91): p14.

36 cf. op. cit. note 35, for evidence for all these arguments and especially the Opinion of the Committee: p21, point 84.

37 cf. Mallier, A.T. and Rosser, M.J. (1980a): p4.

38 cf. Morton, L. (1987): p29. cf. White Paper "Building Businesses not Barriers" (1986).

39 cf. Morton, L. (1987): p29.

The provisions of this proposed legislation are an increase in the number of hours needed to be worked per week in order for that week to count in computing a period of employment from sixteen to twenty, and from eight to twelve weeks for a period of five years for the same. This White Paper involves increasing the number of hours per week to be worked to enable employees to obtain basic employment rights, at a time when there is a substantial increase in part-time employment. Furthermore, it is also propounded to parliament in this paper that the right to reinstatement after birth as set forth in the EP(C)A will no longer apply to women working in firms where the number of employees in that firm does not exceed ten. It was estimated by the Equal Opportunities Commission that the "increase in the number of hours qualification" would mainly affect women:

if this White Paper is passed unamended 294,000 workers will lose their right to employment protection, 95% of whom are women.⁴⁰

As regards the second proposal:

The EOC estimates that this will affect about 140,000 women.⁴¹

This paper points to another example of the position adopted by successive 1980s' UK Governments on this issue. UK policy has been consistent with regard to the non-enactment of the principle of non-discrimination. Governments have been keen to stress the conflict between the enactment of the principle and the creation of jobs. As a result, social protection is presented as being in conflict with the flexibility of employers and consequent economic growth. This is seen most clearly in the Secretary of State's "objective justification" above, where it is maintained under SEL that the Government's policy (economic) goal is to create more part-time employment and the means to this end are through the non-enactment of this principle. The principle of non-discrimination is set up as being in conflict with the goal of the creation of part-time employment.

⁴⁰ *ibid.*

⁴¹ *ibid.*

By maintaining this opposition, the UK Government present us with an understanding of part-time employment which can only exist as low paid employment. The maintaining of the opposition of social protection to job creation aids in the denial of the economic worth of part-time employment to the employer. In the case cited above, the denial is clearly seen. The denial of the worth of part-time employment does not operate at this level alone, however. The Governments's denial is additionally seen to be upheld by SEL, the structure of which lies comfortably with a separation of "social" aspects from "economic" aspects. It is also upheld in Social Security law which, for many years, has been based on a denial of married women's earning power - the residual effects of which are found in the exclusion of part-timers from many social security schemes.

Such denials in statutory law build on the denial of worth of part-time employment by the segmented labour market. This in turn builds on the implicit denial of the process of segmentation in Government discourse. This is seen in *Regina v Secretary of State* discussed above, where the regulation of the market is classified as "social" regulation, thus implying that it has nothing to do with the free functioning of market forces, but is concerned with social goals. All these factors work together against the conceptualisation of part-time employment as being anything other than low paid secondary employment for married women who want it. Taken together, they suggest a policy of cheap labour recruitment. In conclusion, therefore, the protection of part-time workers in the UK must be seen as being completely subordinated to the economic goal of employer flexibility.

Conclusions

French Part-Time Employment Policy had as its main goals the encouragement of job creation and both employer and employee flexibility. French Part-Time Employment Policy thus embraced both economic and social goals, which were held to be relational and mutually beneficial. Similarly, UK Part-Time Employment Policy had as its main goals the encouragement of job creation and flexibility. Here, however, the goal of flexibility was

understood solely in terms of employers' requirements (employees were understood as already having free movement within the labour market). By contrast to France, UK Policy did not understand economic and social goals as being mutually beneficial. On the contrary, they were held as separate and distinct goals.

As well as differences in policy goals, conceptualisations of labour market functioning differed between France and the UK. In France, the model of labour market functioning on which the policy depended was akin to understandings made by the early LMS theory⁴². This meant that the labour market was understood as being segmented: this was evidenced in the treatment of part-time employment as a segmented and secondary employment type. Not all aspects of labour market segmentation were openly recognised by Government rhetoric, however. In particular, labour market disadvantage for women was not seen to be directly acknowledged. In the UK, the model of labour market functioning upon which the policy relied resembled that of the neoclassical understanding of economic functioning⁴³. The labour market was understood to be a free and fair market and part-time employment was not treated as a segmented employment. Its low pay status was understood as being a feature inherent in it. Additionally, part-time employment was not viewed as causing labour market disadvantages for women. Instead, it was upheld as being positively desired by women.

The most exciting discovery I made was in the detection of a legal questioning of the effects of segmentation barriers in the usage of the principle of non-discrimination and rules governing movement in and out of part-time employment in France. This meant that the principle of non-discrimination, used alongside rules of labour allocation, appeared to move out of the realm of the sources' doctrine and into the area of consequentialism. However, this ability was hampered by the fact that the principle was not being used in French Policy purely to tackle the effects of segmentation. In fact, I noticed a contradiction in the usage of the

42 cf. Chapter One of the thesis.

43 *ibid.*

principle in that it was used, on the one hand, to encourage employer flexibility, which necessarily involves the segmenting of labour markets, and, on the other hand, was expected to tackle the effects of the very same process of segmentation. In addition, the specific form of the principle of non-discrimination adopted was one where the social protection aspects were subordinated to the economic flexibility goals. Therefore, although Government rhetoric held these two aspects of the principle as being mutually beneficial, I would question whether this is the case, especially given the continued rise in low paid part-time employment for women in France with the statutory enactment of the principle intact.

In the UK, the denial of the process of segmentation meant that there was no questioning of either the causes or consequences of segmentation barriers. "Harmful" barriers were conceptualised in a neoclassical sense as legal interventions in economic functioning restricting the free movement of market forces. Social protection law was seen to be such a barrier. Part-time employment policy was labelled "social" policy and held as being detrimental to economic goals. The result was a total subordination of social protection aspects to the economic goals of flexibility.

The Chapter indicated that whereas there was a clear labelling of "economic" versus "social" policy goals in UK Government discourse, in France, distinctions under "economic" and "social" headings seemed to be fudged under a general policy of labour market regulation. Two such different approaches to "Social Policy" points to potential problems at EC level on how to proceed with the regulation of part-time employment. It is to this debate that I now turn in the final part of the thesis.

PART IV

CHAPTER SIX - "INSTITUTIONAL CONSTRAINTS ON PART-TIME EMPLOYMENT POLICYMAKING: STRUGGLES AT EC LEVEL"

Introduction

This chapter starts the exploration of the European Community (EC) position on part-time employment, in the general context of EC understandings of the regulation of the common or internal market. Findings from previous chapters are re-explored within a Community context, with the aim of providing a theoretical analysis of Community policy on part-time employment. I will show that, despite the various attempts to regulate part-time employment at Community level, there is no Community Part-Time Employment Policy. This chapter looks at one of the key reasons for the lack of such a policy - the institutional power structure and the way this has developed. In particular, the role of the EC Commission will be explored in relation to the EC Council of Ministers which has, for long periods of time since the establishment of the EC, gained in strength over the Commission and the European Parliament thereby greatly affecting the operation of the decision-making process.

Changes in the power structure have had two main effects, which are explored in detail throughout. Firstly, the power of national interests has at times grown over and above all other interests and, in particular, over the notion of the "general interest" of the Community. This is indicated at the moments in question by a weakened Commission and a strong Council and European Council. Secondly, where the "general interest" of the Community is ambiguous, the power of the "national interest" is even more marked. This will be demonstrated by the difficulties the Commission has experienced in pushing for action in an area considered to be to the "general interest" of the Community, when this is ambiguous in the Treaties. This area is the "Social Policy" area, under whose heading attempts to regulate

part-time employment have been made. This second finding leads us to a third related problem, namely how EC Social Policy (and proposed Part-Time Employment Policy) is linked to Treaty objectives. This last question will be explored fully in the next chapter.

The chapter is divided into two main sections. The first traces key shifts of power which have taken place as a result of the evolution of the EC decision-making process. A linear approach is adopted to do this. The advantage of such an approach is that institutional changes relevant to the making of law in the Social Policy area are more easily located; the disadvantage is that at times complex and subtle institutional power relations are presented in a less sophisticated manner.

The second section, continuing such a linear approach, traces the history of the draft part-time employment directives. This section has a twofold aim: the first is to provide examples of the findings made in the previous section and relate these findings specifically to the making of Part-Time Employment Policy. The second is to explore how the various EC institutions understand the economic and social dynamics of Part-Time Employment Policy.

Finally, I have based many of the findings of the second section in particular on the results of interviews conducted by myself in July 1992 with EC Commission officials from the Directorate-Générale for Employment and Industrial Relationships and Social Affairs (DGV). These will be indicated where appropriate.

The Treaty Power Structure

The first section is concerned with exploring the power structure of the European Community institutions as initially conferred on the institutions by the EEC Treaty¹ and as

¹ The ECSC Treaty confers different powers on the same institutions: for example, the High Authority Commission] holds supranational powers under the ECSC Treaty. The institutions established separately by the different Treaties [ie. the ECSC Treaty, the EEC Treaty and Euratom] were all physically merged into a single set of institutions by the Merger Treaty 1965: they continue to exercise the powers as conferred by the separate Treaties. All references made to Articles in this Chapter are to EEC Treaty Articles, unless explicitly stated.

subsequently interpreted by the institutions themselves. The European Court of Justice is not to be explored here, because this chapter will focus on the ability of the policy formation institutions to influence the content of legislation. More recent amendments to the EEC Treaty, in the form of the Single European Act (SEA) and the Treaty of European Union signed at Maastricht (the Maastricht Treaty), will also be briefly considered to highlight the latest shifts in power. The findings of this exploration will subsequently be used as a crucial level of explanation for the difficulties faced by the Commission and the European Parliament in securing social rights for groups of workers at EC level.

The EEC Treaty

The EEC Treaty has as its main stated objective the establishment of a common market in goods, services, workers and capital². The establishment of the common market is to be realised through co-operation at Community level in the making, implementation and administration of law and in the removal of national "barriers" which are contrary to the principle of free movement. "Barriers" to be removed are either specifically located in the Treaty or are to be agreed upon at Community level. The EEC Treaty specifies the jurisdiction of Community Law and delineates the areas needing to be regulated, in order to ensure the free movement of goods, services, workers, capital and persons³. It also points to "barriers" needing to be dismantled. For example: Article 51 reads as follows:

The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers,

or for example..

*Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.*⁴

² The ECSC Treaty laid the foundations for a common market in coal, coke, iron ore, steel and scrap. cf. Nugent, N (1991): p35.

³ The ECJ has interpreted the jurisdiction of Community Law in its own jurisprudence, but this is not a matter under discussion here.

⁴ cf. Article 30 EEC Treaty.

The Treaty outlines clear provisions for enactment of law in some areas of agreement and other areas are referred to in a general way⁵: for example: there is a contrast between the wording of Part II, Title I, which is concerned with the free movement of goods compared with the wording of Part III, Title III, which is concerned with Community Social Policy. In the first case, clear provisions exist, whereas in the second case, the wording is more general⁶. In all cases, where there is a clear Treaty command for regulation at some stage, the level of agreement needed in the Council is also given, eg. some Articles require a unanimous vote, others a simple majority vote and others a qualified majority vote⁷. In this manner, the Treaty itself is considered in terms of primary or basic Community law and law enacted on the basis of a Treaty obligation is termed secondary Community law. The EEC Treaty thus provides a framework for the establishment of a common market in certain areas connected with the free movement of goods, services, persons, workers and capital. It, together with the ECSC and Euratom Treaties, forms the basis for what is commonly known as the European Community (EC).

The Institutions - Powers Conferred By Treaty

Institutions are established by the Treaties in order to make, enact and administer Community Law. The Merger Treaty, agreed upon in 1965, had as its task the physical merger of the three main institutions: the Commission, the Council of Ministers and the European Court of Justice. The European Parliament is established by the EEC Treaty and is referred to as the Assembly by the Treaty. The Commission, the Council of Ministers (the Council) and the European Parliament (EP) are each designated a specific function in the decision-making procedure, each being designed to reflect a different interest with an overall aim of the balancing of interests. The division of powers is less visible and unique to the EC. It must be perceived as one intended to provide effective implementation of the provisions contained in

5 cf. Nugent, N. (1991): p41.

6 More is said about the wording of this latter Title in the next chapter.

7 The weighting of the qualified majority vote is given in Article 148 EEC.

the Treaty. Thus, it is worth exploring both how the legislative, executive and judicial functions have been distributed amongst the three institutions and also how the relationship between the balancing of powers and interests is constructed.

The Commission consists of seventeen national appointees, who serve a term of office for four years: the term of office is renewable⁸. The Commission is granted executive functions and, in some instances, legislative and judicial powers. This is clearly laid down in Article 155. The Commission has as its main task the formulation, initiation and proposal of policy: in this way, it can be perceived of as having political power. Its role as guardian of the EEC Treaty means that it is responsible for ensuring that the provisions contained therein are observed and that decisions taken by the Community institutions are applied correctly. The Commission has the power to raise actions in the Court of Justice against Member States for failing to implement either Community law itself or an obligation imposed by Community law⁹. The Commission thus has policing power.

The powers described must be seen in connection with the nature of the "interest" which the Commission is to reflect. Article 10 of the Merger Treaty expressly states that the members of the Commission must act in the "general interest" of the Community. This is an important aspect of the power which the Commission holds and will be developed throughout this chapter. It is to be noted for now that the Commission is established as an "impartial" institution, whose aim is to promote "the Community" as an entity: impartial in this instance is taken to mean impartial from the Member States' perspective. In other words, its members must be independent of "national interest" in the performance of their duties, which involve moving the Community towards the attainment of Treaty objectives.

8 cf. Articles 10 & 11 Merger Treaty.

9 cf. Article 169 EEC Treaty.

The Council is the forum for Member States' views and consists of the relevant representatives of the Member States, eg. the Agriculture Council will consist of Agricultural Ministers and so on. The senior Council is called the General Council and is made up of the foreign Ministers of the Member States. The Council is granted legislative functions and constitutes the principle legislative body under the EEC Treaty: it has the final say on the content of the legislation to be enacted. The Council also holds an indirect power of initiation by virtue of Article 152: this Article gives it the right to request the Commission to make proposals in any area which the Council feels desirable for the attainment of the common objectives of the Treaty. The Council's Treaty powers can thus be seen to overlap with those bestowed on the Commission. The importance of this will be revealed as the chapter develops.

A significant difference between the Council and the Commission can be found in the area of "interest". While the Commission is mandated to act in the "general interest" of the Community, the Council is to be the forum for Member States' views and will consequently be the body where "national interests" will be expressed. The relation of the Commission to the Council can thus be understood in terms of the relation of the "general interest" to "national interests". This will be seen more clearly as the discussion continues, especially with regard to the Social Policy area.

Very little is said about the function of the European Parliament (EP) in the EEC Treaty¹⁰. Article 142 states that the EP is to adopt its own rules of procedure, which it has now done. There are, however, two important Treaty obligations which will be mentioned here. Firstly, the Treaty makes provision for future direct elections to the EP¹¹: until they are organised, the EP is to be composed of delegates appointed by the Member States' parliaments. Secondly, the EP is granted the right to pass a motion of censure on the Commission: it is not, however, granted the right to appoint a new Commission. Nevertheless,

10 The EEC Treaty refers to the European Parliament as the Assembly, but I will refer to it throughout as the EP.

11 cf. Article 138 EEC Treaty.

this is an important potential power, as it has a bearing on the way in which the Commission will approach its relationship with the EP¹².

Summarily, the EP's powers are described in the EEC Treaty as being "advisory and supervisory". The EP is consequently allocated far less power by the EEC Treaty than either the Commission or the Council. This fact must be seen alongside the notion of "interest". The EP is the forum for regional and group interests and, in a more general manner (and especially after direct elections have taken place), for the "people of Europe's" views. The interests which the EP is to represent are, therefore, distinct from both the Commission's and the Council's and, in addition, its powers are also weaker. The alignment of a group or regional interest with either the "general interest" or a Member State's (or several Member States) interest(s) will consequently be crucial to the EP's effective and more equal exercise of power. This point will be developed later on, but is to be noted for now.

In addition to these main institutions, there are other interested parties and institutions which operate at Community level and are established by the Treaties. COREPER is established by Article 4 of the Merger Treaty and the Economic and Social Committee (ECOSOC) is established by Article 193 of the EEC Treaty. COREPER is a body of permanent representatives or ambassadors of Member States who assist the Council. The ECOSOC consists of representatives of various categories of economic and social activity, eg. employers, workers, union representatives and so on. Both these bodies, COREPER and the ECOSOC are to act in an advisory capacity in the making of legislation and represent interests which are either not otherwise represented or are under-represented for the purposes of the Treaty obligations.

This brief outline attempts to illustrate how the Treaties allocated interests, powers and functions to the institutions. This complex division of powers and interests within the

¹² The EP has never in fact passed a motion of censure on the Commission.

decision-making process is to ensure adequate representation and efficiency in the attainment of EEC Treaty objectives. However, the interpretation of these roles by the institutions themselves, in particular in the drawing up of rules of procedure, has led to a shifting in the balancing of powers and interests over the years, thus strengthening certain interests at the expense of others. The next section will explore the first stage of the political dynamic of integration of the Member States in the Community.

Shifts in Institutional Powers: 1950s - Mid-1980s

The Decision-Making Procedure

For the purposes of this chapter, the key shifts of power are best understood by examining the operation of the decision-making procedure prior to the signing of the Single European Act (SEA). The main internal policy-making procedure operates between the Commission, the Council, the EP, COREPER and ECOSOC. During the initial stages of policy-formation, a pluralistic input of "ideas" and "opinions" from many different groups, institutions or representatives outside the smaller Community system is the norm. In addition, and depending on the subject matter under discussion, rules of procedure have developed whereby certain interested parties will automatically be consulted at some point in the stages of policy formation. For now, however, I am concerned with looking at the operation of the smaller system, leaving the input of other groups for later discussion on the draft directives on part-time employment.

The Commission is responsible for collating material and drafting proposed legislation. It is the sole institution empowered to send to the relevant Council of Ministers a drafted proposal for enactment into law. Interested parties are either directly consulted by the Commission or given the opportunity to make their opinions known to the Commission. The EP is also usually involved at this stage. Although a wide variety of parties will have "their say" on the content of the legislation, it is the Commission who is officially responsible for the drafting of the actual text in question. This constitutes a great source of the Commission's

power, both in the use of language and in the subsequent persuasion in the Council for the adoption of its proposal. This is especially the case when the Council does not require a unanimous vote for enactment.

A working party to the Council will undertake initial examination of the provisions contained in the proposal. The working party of COREPER will liaise with the Council working party to discuss primary difficulties and propose solutions. The COREPER working party then drafts a report, listing those items it approves as A points and those items which it perceives will cause disagreement or create difficulties as B points. After debate, the Council will send the proposal to the EP for consultation and will seek an advisory opinion from the specialised section of ECOSOC. The Council does not have to consider the opinion of either body in its final decision, but must have received their opinion before it can enact legislation. It is the Council which ultimately takes a final decision, but as Nugent notes...

*Ministerial meetings thus constitute the third stage of the Council's legislative procedure.*¹³

According to the Treaties, the Council takes its decision by voting. The type of voting procedure which comes into operation when the Council wishes to enact legislation is specific and depends on the legal basis of the piece of legislation under review. Thus, in certain instances, the Council is required to pass a piece of legislation unanimously, sometimes a simple majority vote suffices and other times a qualified majority vote is necessary. But, the method of voting as adopted in practice has had a substantial bearing on the whole process of policy-making.

One of the main influences on the content of the legislation has been the method used within the Council to enact a proposal. As described above, the Treaty voting procedure is precise. A political row between France and the other Member States in 1965, however, led to the signing of an agreement (the Luxembourg Compromise) which was to have a profound

¹³ cf. op. cit. note 5: p113.

effect on the way in which decisions were to be subsequently taken. At this time (mid-1960s), the formation of the character of decision-making was still in its infancy. The row itself dwelt on a newly recognised problem, namely the exact nature of the "general interest" of the Community. France, under the leadership of de Gaulle, argued that proposed Community policy, which went against the "public interest" of a nation state, should not be enacted by the Council in the name of the "general interest" at the expense of that "public interest" exposed. Instead, the Council should attempt to rethink the policy and aim to achieve political consensus within the Council. This idea had the effect of establishing the right of veto as a political rather than a legal right. Thus, from 1966 onwards, the norm for decision-making within the Council was one of consensus, rather than actual voting *per se*. In the main, such unanimity decision-making was perceived as progress at this time¹⁴.

The Changing Role of the Commission

The main impact unanimity decision-making (through consensus voting) had was on the role of the Commission in its capacities firstly, as initiator and proposer of policies and secondly, as mediator/conciliator with regard to difficulties arising from the content of such policy. Increasingly the Commission found that it had to tailor its policies to ensure a consensus agreement within the Council and word its texts for the same purpose. Other problems connected with leadership difficulties also meant that during this time (1970s) there was a great reluctance to enact law in the Council¹⁵. The Commission's creative function was stifled by the constant awareness of the need to get agreement in the Council¹⁶. The net result was that the idea of the "general interest" was greatly sacrificed to the "national interests" of the Member States.

14 For more discussion of French European Policy during the 1960s under De Gaulle, cf. Twitchett, . and K. (1981): p43 et seq..

15 This is discussed further on.

16 cf. Henig, S. (1980).

This difficulty was increased by the growing politicisation of the role of the President of the Council. Henig writes that as the emphasis in the 1970s became one of reaching agreements which satisfied all, rather than the actual taking of decisions, this in turn led to...

*the gradual emergence of the Presidency of the Council as an institution in its own right and in certain respects rivalling the Commission.*¹⁷

Thus, much of the in-between, behind-the-scenes persuasion and ascertainment of opinion, accompanied by political lobbying was done within those committees and working groups associated with the Council and at the Council meetings themselves, with all concerned agreeing on the general aim of consensus. This obviously infringed upon the Commission's crucial role of collecting opinions and putting forward suggestions for alternative and compromising provisions of its draft proposals¹⁸.

Simultaneously, the Council made much use of Article 152 of the EEC Treaty¹⁹, thus greatly influencing the proposing of policy and pre-empting the Commission here too. This observation reduces Hartley's point that if the Commission does not initiate the procedure then no decision can be made in the Council²⁰. It would seem that the Commission is a very keen body and "wants" to propose policy in the general interest of the Community and the actual difficulty it faces is that its policies are more often than not weakened within the Council itself²¹. Hence, although the Council depends on the Commission in order to make a decision, this dependence in practice is simply a matter of procedure rather than a matter of power.

17 *ibid.*: p29.

18 cf. Hartley, T. (1988): p38.

19 Article 152 allows the Council to request the Commission to undertake studies and/or submit proposals which the Council considers desirable for the attainment of the common objectives. cf. *op. cit.* note 5: p73 et seq., for a discussion on the potential of the Council to stimulate development in new policy areas.

20 cf. *op. cit.* note 18: p37.

21 I shall look at this later with reference to legislation dealing with part-time employment.

The sectorially determined committee structure of the Council also affected the operation of the Commission. As Commission cabinets' liaised closely with Council committees (including COREPER as an integral part of the Council structure), so the Commission itself became an increasingly sectorially divided body. This meant that the "general interest" of the Commission became even less well-defined, with some parts of the Commission moving in one direction and others moving in another. Later on in this chapter, it will become apparent that even within DGs, factions representing different interests clash over the "general interest". Strong Commission leadership is thus required to unify the Commission²².

The problems faced by the Commission in its ability to perform its role are not confined to its relationship with the Council. The enlargement of the Community has led to a great increase in the workload, in many ways resulting in an overburdened Commission. As the Community has grown in size and as the legislation has become more detailed, covering a wider field, so the Commission has become increasingly bureaucratic, with the cabinets' function of planning and co-ordination taking up more and more time. This increasing bureaucratic element, coupled with the loss of certain aspects of its political role, has meant that the creativity of the Commission in those areas not governed by specific provisions in the Treaty, such as the Social Policy area, has not reached its potential²³.

The Changing Role of the EP

The shifting balance of power has over the years come to place increasing emphasis on the importance of "national interests". This, in turn, has had a great impact on the ability of the EP to secure greater powers for itself. Given its limited role in decision-making as conferred by the Treaty, the most effective way for the EP to ensure its participation in

22 During this time COREPER expertise grew rivalling that of the Commission - this in turn put additional pressure on the Commission in its relationship with the Council.

23 "The tensions .. between the politically creative elements of the Commission's responsibilities and the bureaucratic roles of administering and implementing have perhaps never been resolved, or even acknowledged", cf. *op. cit.* note 5: p99.

decisions on the content of legislation has been to either present group interests in terms of the "general interest" and form an alliance with the Commission, or to put pressure on a national Government or Member States to reach consensus. In practice, the EP has tended towards the first of these two strategies. Let us consider this in more detail.

One of the main aims of the EP since the beginning of the Community has been to set up direct elections of its members. In accordance with Article 138 EEC²⁴, the Council Decision and Act of 20 September 1976 secured direct elections to the EP. This decision was in addition motivated by the realisation that as Community law grew to encroach more and more on what was traditionally seen as Member States' internal affairs, so the need for a democratically-elected body became paramount. The fact of being elected, therefore, has given the EP a strong and more powerful base for its authority. Since the first direct elections in 1979, a democratic and political dimension has been added onto its consultative functions and provided the justification for its greater exercise and acquisition of power. Consequently, the EP has over the years progressively strengthened its role in decision-making²⁵.

In accordance with the EEC Treaty, the EP has set up its own rules of procedure, which are increasingly respected by the other institutions. The EP is involved in pre-proposal policy discussions: it liaises closely with the Commission and indeed its working relationship with the Commission has been very successful over the years, with many of its ideas and projects being adopted by the Commission to form the basis for new policy initiation. The success of its relationship with the Commission can be attributed to a number of factors, the most significant of which is the increased power of the Council. An alignment of interests between the EP (with democratic authority) and the Commission (with Treaty authority) has proven necessary when faced with the great political weight of "national interests".

²⁴ Also in accordance with Article 21 ECSC and Article 108 Euratom Treaties.

²⁵ cf. Nicoll, W. and Salmon, T. (1990).

On the whole, however, the EP's powers during this time remained purely consultative, with its interests and policy being injected into the Community system at the early stages of policy formation. There are two main reasons for this which are important to this chapter. In the first place, the Treaty obligations on the Commission and Council with regard to the EP are minimal: quite simply, the Treaty allows for both these institutions the right to ignore the opinion of the EP, once having asked for it. Only in a few limited areas, such as the budget, did the EP increase its legal power during this time²⁶. The second reason is connected to the general issue of "interests". The EP in its working relationship with the Commission has generally sought to align particular group interests, or its interest, with the "general interest" of the Community. However, if the "general interest" is constantly being sacrificed to "national interests", then the EP's powers are in fact further reduced rather than enhanced. In short, the consensus politics of the Council in unanimity decision-making has affected the powers of the EP as well as the powers of the Commission. Thus, although the EP has managed to increase its power, it still remains a comparatively weak institution.

Finally, a few brief words will be said in relation to the other influential bodies operating at Community level. As has been mentioned, ECOSOC is heavily involved in the decision-making process. Other lobby groups have managed to gain a certain amount of power over the years and have a direct input into policy-making. In the Social Policy area, both the Union of Industrial and Employers' Confederations of Europe (UNICE) and European Trade Union Confederation (ETUC) have offices in Brussels and will offer opinions on labour market legislation. Arguably ETUC, in particular, has not managed to assert a great influence on the decision making procedure, but meetings have taken place between the Social Partners on the impetus set by the Val Duchesse Agreements²⁷. In addition, standing committees to the Council have been established and the Employment Standing Committee will make comment on legislation. There is no real consistency in the impact which institutionalised

26 cf. The 1971 and 1975 Treaties which increase the EP's budgetary power, cf. EP Policy Series 1989): p3.

27 cf. Teague, P. (1989): p70 et seq..

pressure groups and ad hoc pressure groups have had on the content of legislation: this is particularly true of the Social Policy area and I intend to consider types of influence in relation to specific pieces of legislation in more detail later on²⁸.

The European Council

In the 1970s, the establishment of a new institution signified the growing importance of intergovernmentalism as a means of making decisions. The evolution of the intergovernmental dimension to policy formation, at the expense of the supranational dimension, is marked in the emergence of the European Council as an institution in its own right. The European Council is best described as "institutionalised summitry"²⁹: at various times in the 1960s and 1970s, the Heads of State or Government would meet in the form of a Higher Council and discuss Community issues. At the Paris Summit of 1974, it was agreed that Heads of State or Government and Foreign Ministers would meet on a regular basis as a European Council - the Commission would also be entitled to attend these meetings. In this manner, the European Council was established.

The role and function of the European Council was not precisely set down at this stage, but there are three main statements of its functions: the 1974 Paris Summit Communique, the 1977 London statement issued by itself and the 1983 Stuttgart Council Declaration on European Union³⁰. In Bulmer and Wessels, its functions are listed as follows: informal exchanges of view, defining the guidelines for integration, policy orientation, scope of enlargement, policy co-ordination, issuing declarations on foreign relations, *de jure* decision-making, problem solving and policy monitoring³¹. Impulses towards summitry are also propelled according to Bulmer and Wessels by the following factors: institutional inertia in

28 cf. op. cit. note 27, for a general discussion on the roles of the Social Partners.

29 cf. op. cit. note 5.

30 cf. Bulmer, S. and Wessels, W (1987): p7.

31 *ibid.*: p14.

the EC; the welfare state, governmental overload and political centralisation; interdependence of the Member Governments; and finally, the decline of the influence of the United States of America. Here, I will confine the discussion to the first of these influences.

A major difficulty to emerge during the 1960s and early 1970s was the lack of leadership at Community level. The General Council had problems in reaching agreement in areas such as EC external relations and institutional developments, issues needing to be resolved in a growing Community. The Foreign Ministers who sat on the General Council lacked the political authority to make package deals and reach consensus in "new" and important policy areas. In addition, the role of the Commission was being weakened by the focus on consensus politics. Not only did the Commission lack the judicial authority to make the "big" decisions, but also its political role was in jeopardy at this time³². There was, therefore, a growing need for a Higher Council with political authority to take charge³³.

The European Council's growing importance must be seen in the context of the failure of the Treaty established institutions to lead the Community during this period. As time has gone by, it has become apparent that it is at European Council meetings where key decisions concerning major Community issues are taken: this institution is now a principal player in the Community system, with great political power. Its role has remained at a high level of policy direction, making weighty political decisions: it does have the power to transform itself into a special Council of Ministers and thus exercise a legislative function, but has never done so³⁴. Its role has been extremely important in steering the Community into new areas and through tricky patches of disagreement. For example: the three enlargements of the Community were negotiated in the European Council, as were key decisions with regard to

32 *ibid.*: p113.

33 *ibid.*: p46.

34 *cf. op. cit. note 5: p175.*

European Union; the SEA and the Maastricht Treaties were both born from and signed in European Council meetings, as was the Social Charter³⁵.

At the Paris Summit of 1974, it was still unclear how the functions of the European Council would fit in with the functions of the other institutions. Up until the signing of the SEA, the European Council formed part of the political branch of co-operation at EC level outside the Treaty established Community system. Nevertheless, its growing involvement in key Community affairs had a great impact on the functions of the other institutions. I will briefly mention here how the European Council functioned in relation to the Council of Ministers, the Commission and the EP during this time.

The decisions taken by the European Council should have enabled faster decision to be made in the Council of Ministers' meetings themselves. On the whole, the existence of the European Council has enabled such faster and smoother decision-making in the Council of Ministers. Sometimes, however, although political agreement has been reached in the European Council, this has tended to be agreement on the broad policy goals, rather than on the detail itself. In practice, therefore, Ministers still have had to agree on the detail of legislation³⁶. This will be seen to be an important factor in the discussion of decision-making at Community level. Although the European Council makes "big" decisions in the "general interest" of the Community, in practice, in the Council of Ministers' meetings, national interests can still be weighed against new incentives. Heads of Government can be seen to agree in a very public way and then still have the option to disagree, on the grounds of the impossibility of implementation, in the private lower Council meeting.

35 *ibid.*: p76.

36 This of course gives Member States opt out solutions when it comes to the crunch: they can agree on something in general at the European Council meeting and then allow their ministers to argue about impossibility of implementation at a lower level of ministerial meeting.

The Commission's role is arguably enhanced by the existence of the European Council³⁷: this enhancement stems from the fact that involvement in the European Council meeting gives the Commission access to top politicians, where it can assess the likelihood of the enactment of the legislation under review. It can also use the Council meeting as a lobbying forum. This positive effect of the European Council on the Commission is, however, counterweighted by the negative impact which this institution also has on the Commission. Nugent describes the European Council's function as further undermining the Commission role as policy initiator³⁸. As noted above, much policy now emanates from the European Council rather than from the Commission - the Commission's role in this manner can be seen as one which responds to the Council, rather than the other way around. What is certain, is that its existence has moved the Community towards intergovernmentalism as the way of making decisions at the expense of supranationalism.

The main loser in the system is of course the European Parliament³⁹. As detailed in Bulmer and Wessels, up until 1981, there was no formal channel of communication between the European Council and the EP⁴⁰. Consequently, the Community was able to move forward and initiate new policy without the opinion of the EP ever being heard. The EP's consultative role did not extend as far as the top institution, where key issues were being settled. This has been remedied to some extent by the 1987 decision⁴¹, but it can be argued that the existence of the European Council has overall added to the democratic deficit of the Community.

A final and general problem created by the European Council concerns group representation at Community level. The existence of the European Council has limited the

37 cf. op. cit. note 30: p110.

38 cf. op. cit. note 5: p177.

39 cf. op. cit. note 30: p114.

40 *ibid.*: p115.

41 cf. EP Policy Series (1989): p8.

ability of certain weaker groups to lobby and have an input in initial policy formation: these groups may in fact only be represented by the EP, which itself has only had limited access to European Council meetings. Consequently, the richer and more powerful lobby groups are the ones whose voices are heard at Summits and these groups are probably already represented at the meeting in any case⁴². The emergence of the European Council has thus added to the problem faced by smaller and less powerful interest groups of access to the decision-making procedure.

Key Amendments to the Treaties: Further Shifts of Power

The Single European Act (SEA) and the Maastricht Treaty

Let us now turn our attention to the judicial or Treaty dynamic of integration and briefly consider the relevant parts of two key pieces of legislation, the SEA and the Maastricht Treaty. The SEA was signed in February 1986 at a European Council meeting, and came into force mid-1987. The Act extends EC competence into some new areas of law, eg. co-operation in economic and monetary union, economic and social cohesion (regional development), research and technology and the environment. In the main, however, the Act is concerned with the speeding up of the process of establishing the common market and, indeed, sets a political deadline to this effect of the 31st December, 1992. The Act consequently is about the enactment of the means for prompt completion of the single market and this is seen clearly in its chief provisions.

There are two main parts of the SEA which are of relevance here⁴³. The first concerns the extension of the qualified majority voting procedure into prime areas of EC competence.

42 This problem is best understood by looking at the process of lobbying which took place during the drafting of the Maastricht Treaty. Powerful lobby groups were able to have a much greater influence on the content of the Treaty than the EP itself: the result is the long list of inconsistent protocols stuck to the end of the Maastricht Treaty.

43 For further reading, cf. Ehlermann, C-D (1990); Pinder, J. (1987); Pescatore, P. (1987); Edward, J. (1987).

The most important of these is the amendment of Article 100 by Article 100a to allow for qualified majority voting, as distinct from unanimity voting, in the Council when enacting law in the general area of the establishment and functioning of the internal market. Another key addition to the EEC Treaty which is of relevance here is the new Article 118a in the Social Policy Title: this concerns the harmonisation of the health and safety of workers and also requires a qualified majority vote in the Council. The extension of qualified majority voting into new areas can be seen as a measure to speed up the process of decision-making within the Council in those areas considered to be important to the overall objective of Article 8a⁴⁴.

There is in fact a positive effect on the Commission of the extension of the need for a qualified majority vote. As has been realised, the more emphasis which is placed on the need for consensus in the Council, the less the political power of the Commission. The Commission, therefore, can be seen to have gained strength from the SEA, as once again, its persuasion will count for much if only a qualified majority vote is needed in the Council.

The second aspect of the SEA which is of interest here concerns its creation of a new procedure of decision-making, called the "co-operation procedure", established under Articles 6 and 7 of the SEA⁴⁵. This new procedure includes the EP in the making of decisions in certain areas of law and can be seen as part of a commitment to grant more powers to the democratically elected institution. There are two main criticisms of this procedure. Firstly, there is no time limit placed on the adoption of the initial common position by the Council. Given the policy of consensus operating (even in a situation where qualified majority voting alone is required by the Treaty), sometimes it takes the Council a long time to adopt a common position and sometimes one is never reached. This means that the co-operation

44 The main weakness of the SEA is that it contains a contradiction in purpose. On the one hand, it is aimed at speeding up the process of integration, but on the other hand, it allows for derogations to this end, by way of Article 8c and Article 100a(4). This is in fact the first time that the [now amended] Treaty has allowed for Community law to be applied differently or at different times between Member States. The SEA can be seen therefore as setting a precedent for other opt-outs, many of which were to follow in the form of the "Maastricht opt-out brigade". For a discussion of Article 100a(4), cf. Flynn (1987).

45 cf. Article 149 EEC Treaty.

procedure can never come into operation and provides the Council with the opportunity to shelve problematic proposals.

Secondly, it is much argued that this procedure is a token gesture and as a matter of fact grants the Parliament very few extra powers: the legal obligation it imposes on the Commission to consider the Parliament's proposals merely reflects what had actually been happening in practice anyway⁴⁶. In a report commissioned by the EP on the operation of this procedure it is argued that the co-operation procedure strengthens the position of the EP but attributes this to:

*The good working relationship which exists between the European Parliament and the Commission of the European Communities, which places the European Parliament's amendments in a strong position when they come before the Council.*⁴⁷

Moreover, according to the study of fifty co-operation procedures completed by 31 December 1988:

*The Council accepted approximately 44% of the European Parliament's amendments at the first reading; at second reading, this percentage drops to 23%.*⁴⁸

These figures can clearly be interpreted to support the "tokenism" argument. Indeed, they reveal that the percentage of Parliament's initial amendments to be enacted into law is approximately 10%⁴⁹. When one bears in mind that the Parliament represents particular interests not perhaps otherwise represented, this is very small. Indeed, according to a prominent spokeswoman from DGIII, the co-operation procedure has not granted Parliament sufficient powers when seen in the light of an assumed democracy deficit in the Community as a whole⁵⁰. Moreover, it must be remembered that the co-operation procedure comes into

46 cf. op. cit. note 18: p34. It must be stressed that this legal obligation is to "consider" only and does not make it illegal to reject ideas after consideration of them has taken place.

47 cf. EP DOC 133 100: p11 et seq.

48 *ibid.*: p12.

49 23% of 44% = 10.12% ; =10% (2.S.F.).

50 Spokeswoman from DGIII during a presentation talk: Luxembourg 19 March, 1990.

play only in a limited number of circumstances and the powers it allocates to the Parliament are, therefore, at a maximum⁵¹.

On the whole, the Commission's powers are enhanced by the extension of the qualified majority voting procedure and the right to amend proposals accorded by the co-operation procedure. Two factors qualify this, however. Firstly, where there is still a policy of consensus unanimity decision-making in operation, the Commission's powers in such circumstances will be reduced.

Secondly, the Commission is only granted more power to complete the agreed objectives of the internal market. There still remains a problem of the potential ability of the Commission to move the Community into new areas of law, or areas of law whose relation to the Treaty objectives is either ambiguous or contestable. This important weakness can be seen in the Social Policy area. Even with the emergence of strong leadership, in the name of Jacques Delors, the Commission has experienced grave difficulties in moving the Community forward into "new" areas of law. This problem is compounded by the fact that the effect of the SEA on the European Council was to reduce its role as "Court of Appeal" to the Council of Ministers, thus allowing it more time to focus on the "big" policy decisions⁵². This has resulted in "national interests" determining policy direction once again.

A similar problem arises with regard to the content of the Maastricht Treaty. Again, the powers of institutions other than the Council are, arguably, further enhanced, eg. the EP is granted the power of co-decision in certain areas of law. But, the Commission's role (and consequently the EP's power) is greatly reduced by two main aspects of this Treaty. Firstly, the Maastricht Treaty enacts the principle of subsidiarity. Although this is a "huge" principle,

⁵¹ The Parliament has special powers re. the Community budget cf. Article 199 et seq. EEC. The SEA bestowed on the EP greater powers with regard to decision-making in certain fields, the most important of these being the establishment of the internal market, applications for membership and the conclusion of agreements with third countries.

⁵² cf. op. cit. note 30.

it questions even further the notion of the "general interest" of the Community. Secondly, the Social Protocol and Social Agreement annexed to the Treaty, which provide for an opt-out for the UK Government in the extension of Social Policy into new areas of law also questions the notion of the "general interest" of the Community in the Social Policy area⁵³.

Summary

Presenting Community history as a constant tension between intergovernmentalism and supranationalism is a somewhat simplified account of the divide between the Council and the Commission. Certainly, this has not always been the case, a good example of an exception being the Italian Declaration annexed to the SEA which demonstrates that some Member States are in fact in favour of a more supranational Community. Similarly, many influencing factors on changing balances of power are simplified, eg. there is a history of the Council excluding or simply ignoring the EP's view, which is only touched on in this section.

Nonetheless, the picture presented highlights a problem at Community level which is key to the Social Policy area. This is a problem which can affect either the content of the legislation or the existence of the legislation. The loss of power by the Commission, at the expense of the Council, amounts to a loss of power of the "general interest" to the "national interest". The EP, although gaining in power from its original Treaty position, also suffers through the Commission's own loss of power. In this manner, regional or group interests become subordinated to "national" interests. Action taken by the Commission, in the name of the "general interest" of the EC, must be linked to a Treaty goal. Consequently, if the relation of the action in question to the Treaty objective is ambiguous and, if the concept of "general interest" has already been weakened, then it makes it very difficult for the Commission to persuade the Council to enact law in that area. This problem is highlighted in the Social Policy area and will be demonstrated in the next section through the consideration of attempts to establish a Community Part-time Employment Policy.

⁵³ With regard to the Social Partners, a process is at present under way to determine the ground rules for negotiation between various organisations interested in social policy-making under the Social Agreement of the Maastricht Treaty., cf. European Report No.1913 (1993).

Part-Time Employment Policy - EC Initiatives

At EC level, initiatives to create a Part-Time Employment Policy have located the regulation of part-time employment in the more general area of "Social Policy". The EEC Treaty obligation to intervene and regulate in the "Social Policy" area is contestable. The main "Social Policy" Article, Article 117, does not contain a clear and precise command for Community intervention. In fact, there are only two Articles in the chapter entitled "Social Provisions" which do hold clear and precise mandates for action: Article 119, which calls for regulation in the area of pay between men and women and Article 118a, which calls for regulation in the area of health and safety of workers and was added to the Treaty by the SEA in 1987.

The lack of a clear and precise mandate to regulate the Social Policy area does not, however, mean that the Community can never be able to have a Community Social Policy. To begin with, it is possible to read Article 117 as calling for future Community intervention in the Social Policy area⁵⁴. Additionally, the EEC Treaty allows for intervention by the Community in areas which, although not specifically delineated by the Treaty, are connected with the general objectives of the establishment of the common market: in particular Article 100, Article 100a and Article 235 are appropriate to this end⁵⁵. This means that it is potentially possible for the Community to move into areas not specifically defined in the Treaty, but which are nevertheless specifically related to the purpose of the Community. In areas where the need for Community intervention is ambiguous, the role and creative power of the Commission is paramount.

If the Social Policy Title in the EEC Treaty is ambiguous on the means to achieving its objective, then the ability of the Commission to ensure enactment of law in this area will

⁵⁴ I shall show that the Commission did in fact read Article 117 as allowing for Community intervention in the functioning of the common market and, indeed, used it as a basis to uphold its right to act in the Social Policy area in the "general interest" of the Community.

⁵⁵ The next chapter will discuss this in more detail.

rest on its ability to establish a connection between the enactment of law and either the Article 117 objective or the broader Treaty objectives - the establishment and functioning of the common market. This connection is thus crucial to the enactment of law. Given that part-time employment is considered under the Social Policy heading, the ability for the Commission to ensure enactment of a Part-Time Employment Policy depends on the use made of the connection between the policy in question and Treaty objectives. The previous section has hinted at the potential difficulties such a process may entail, given the scenario of a weakened Commission and a powerful "national interest", if a Member State disagrees on the role of Social Policy in the achievement of Treaty objectives. This section will consequently explore a number of problems experienced by the Commission, and other interested parties, in the linking of Part-Time Employment Policy to Treaty objectives.

The History of the Part-Time Directives

Towards the end of the 1970s, both the Commission and the EP began conducting a series of inquiries into Member States' labour market and common market trends⁵⁶. Their main concern at this stage was the rising level of unemployment and they were keen to review employers' and Member States' strategies in the face of changing labour market factors. The aim was to consider a possible Community strategy aimed at tackling common market dys-functioning. This strategy would have as its main objective the encouragement of economic growth, thereby reducing the level of unemployment.

The main documents to emerge at this time discussed various labour market issues under the following broad headings: reduction and reorganisation of working time, humanization of working time, flexibility of working time, work sharing and the position of women in employment⁵⁷. Part-time employment was considered as a form of employment emerging as part of the general changes taking place in labour market structuring and was

⁵⁶ This research was conducted some years after the production of the Social Action Programme (1974) which had highlighted a number of problems in relation to common market dys-functioning. The SAP will be discussed in more detail in the next chapter.

⁵⁷ cf. EP DOCS 2-06-77 116/77: 23-04-80 1-78/80: 24-8-81 1-452-81.

consequently discussed, albeit briefly, under all these headings. The concern for part-time employment at this time must be seen in the context of the functioning (or dys-functioning) of the common market: in this manner it was regarded by the Commission and the EP as a "Community" labour market issue⁵⁸.

The consideration of part-time employment as a Community issue was not by any means a Commission/EP-only understanding. Indeed, the Paris European Council Meeting held in March 1979 formed similar conclusions on aspects of labour market structuring. As a response to this meeting, the Council passed a Resolution on the adaptation of working time⁵⁹. Part-time employment was mentioned in this document under the heading "fields of action". The Council noted that part-time employment was a labour market reality and stated that a Community approach should be based on four principles⁶⁰: firstly, part-time employment had to be voluntary - it was not to be imposed on people who desire full-time employment - and it was to be open to both men and women. The Council added at this point that...

*particular care must be taken to ensure that part-time work is not limited to women or to relatively unskilled work.*⁶¹

Secondly, it had to be available to certain "groups" of workers; examples given were retiring workers and parents of young children. Thirdly, part-timers had to have the same rights as full-timers based on the principle of proportionality, bearing in mind the specific character of the work performed. And finally, it was to have a broad definition, described by day/week/month and did not need not be limited to half-time work. The Council then called on the Commission to present a specific communication on part-time work.

⁵⁸ The Commission DG in question here is DGV, the Directorate-Générale for Employment and Industrial Relationships and Social Affairs.

⁵⁹ cf. OJ C2/1 4-1-80.

⁶⁰ *ibid.*: No.C2/2 at point 4.

⁶¹ *ibid.*

In July 1980, the Commission published an extensive report on the subject of "Voluntary Part-Time Employment"⁶², which was described by the Commission as being "*part of the general approach which the Community is making to the problem of adapting working time*"⁶³. This was an extremely comprehensive document, very sensitive to the complexities surrounding part-time employment: it was based on the Commission's own research and the results of research completed in the various Member States. As such, it embodied a vast amount of knowledge on the growth and nature of part-time employment throughout the Community. Its general understanding of part-time employment was that it would become a very important feature of the future common market. It was also understood that the protection of part-timers at Community level was inadequate at this point in time.

In particular, the Commission drew on conflicting opinions concerning the supply of part-time employment, the demand for part-time employment and the value attached to both: in short, various conceptualisations of part-time employment were given in this report. Numerous groups' opinions were presented, for example, women's groups, UNICE, ETUC and the ECOSOC were all represented by this document. It is, in fact, unique as an example of all the various ways of tackling the regulation of part-time employment and the possible repercussions of choosing a particular formula.

There are three main aspects of the report which are particularly important here. Firstly, the document showed that part-time employment had several functions within the labour market. On the one hand, part-time employment was seen as meeting a demand by (women) workers to reconcile family and employment expectations. It was observed that this latent demand for part-time employment would increase. It was argued that, in the future, part-time employment could play a useful role in the re-organisation of working time, where it could be worked by both men and women (sharing family responsibilities) and be used to

62 cf. Com (80) 405 final.

63 *ibid.*: p1.

facilitate a redistribution of roles between the sexes⁶⁴. There was a demonstrated understanding in the document of the "flexibility in the working life" of the employee.

On the other hand, the document highlighted the importance of part-time employment to the employer. Importantly, the research on employer demand for part-time employment was limited, given that the growth of the services' sector was in its infancy at this point in time. Consequently, the document displayed ignorance on the need for flexibility from the employer's point of view. Instead, the document concentrated on the role of part-time employment in respect of the need for job creation. This focus was policy-orientated, rather than being a focus on employer demand⁶⁵. In this regard, the document noticed two types of part-time employment. The first type met legitimate demand from industry and part-time jobs in this sense were considered as a "true reserve of jobs". The second type of part-time employment was seen as resulting from cost-cutting strategies undertaken by employers, where full-time jobs were simply replaced by part-time jobs. This was facilitated by the low protection of part-time employment, which made recourse to this employment a cheap option for employers.

While it was understood by the Commission that the second type of employment was to be discouraged, through the enactment of measures protecting part-time employment, it was believed that the first type would go some way in terms of growth stimulation. However, it was understood that part-time employment could not be considered solely in terms of growth stimulation, but "*merely [as] an ancillary measure*" in the fight to combat unemployment⁶⁶. Part-time employment, it was argued, was an employment form which was not simply about job creation, but about meeting both the demand and supply sides of the labour market. As a result, a policy on part-time employment had to "*reconcile several aims and*

64 cf. V/1048/79 - EN: p10. (Annex to Com(80)405 final).

65 Job creation was not seen as an employers' need, but as a Community need.

66 cf. op. cit. note 64: p9. It was argued in the document that the crucial boost needed to improve the employment situation would not come from an increase in part-time employment.

partly conflicting approaches"⁶⁷: these included reducing hidden unemployment, providing greater flexibility, improving the status of part-time workers and encouraging socioeconomic mobility (especially with regard to men's and women's roles at home and at work).

The second key aspect of this document concerns the connections made by the Commission between part-time employment, the numbers of women working part-time and sex discrimination issues. For example: a direct link was made in this document between family responsibilities and part-time employment. Additionally, clear doubts raised by women's committees and groups with regard to the perceived "advantage" of part-time employment to women were presented at length. The fact that the Commission evidently considered part-time work as having something to do with women at work and sex discrimination is upheld by interviews with officials in DGV⁶⁸. It is made clear by them that the Equal Opportunities Unit in DGV was heavily involved in the process of policy-formation at this time and that Commission policy on part-time employment was concerned at this stage with the idea of both "equality" and "sex equality". The Commission understood that "sexism" was playing a part in the construction of part-time employment as secondary employment⁶⁹.

Thirdly, the importance of both Social Security law and Tax law in the application of a policy was also noted by this Report:

*The most serious problems concern rules of the payment of contributions, the relationship between contributions and benefits and the fixing of a minimum number of hours or earnings to qualify for membership of the schemes.*⁷⁰

The Commission did not do very much with this important connection at this stage: the Report simply made the point that there were different ways of regulating the protection of part-time workers and the emphasis placed on the relation of social security or tax rules to

67 *ibid.* p10.

68 Interviews conducted by myself in Brussels during July 1992 with Officials from DGV.

69 But, the Commission had no intention of tackling this through Sex Equality Law - part-time employment was clearly seen as being about economic, as well as social, shapes.

70 *cf. op. cit.* note 62: p10.

benefits would depend on the policy adopted. However, the connection of part-time employment policy to social security law would become increasingly important, especially with regard to employment costs.

During 1980, the Standing Employment Committee of the Council deliberated the Commission Report and concluded that specific action should be taken. The EP also requested the Commission to submit proposals to the Council for a directive⁷¹. Consequently, the Commission proceeded to draft a proposal on the regulation of "voluntary part-time employment"⁷². The Treaty base used was Article 100, ie. the regulation of part-time employment was presented as something which was directly connected to the establishment and/or functioning of the common market. A direct reference was also made to Article 117, the main Social Policy Article. The justification for a Community Part-Time Employment Policy was also given by reference to the Council Resolution, the EP Resolution on adaptation of working time (which makes explicit reference to part-time employment as a labour market issue) and the opinion of the ECOSOC (ECOSOC is quoted in the Commission document as accepting part-time work as being an important labour market feature⁷³). It is important to note, therefore, that all the chief EC policy-making institutions at this time were in agreement over the need for action in this area.

The lines of authority used by the Commission in the text of the draft proposal rested on the notion of "general interest" of the Community. The "general interest" of the Community was focused in this area on the reduction of the numbers of unemployed workers through the encouragement of economic growth. The Commission Report understood that part-time employment could only in part be used to meet this objective and that this function would be greatly encouraged if it were adequately protected. Moreover, the links made by the

71 cf. EP Resolution 11 Feb. 1981: OJ C50/40.

72 Com(81)775 final.

73 cf. op. cit. note 64: p7.

Commission between the nature of part-time employment and the concept of sex discrimination clearly indicate that the Commission were keen to play up the protection angle of a Part-Time Employment Policy. Consequently, the regulation of part-time employment was at this stage subsumed under the "protection" heading with the understanding that economic issues were at stake as well.

This is clearly seen in the other lines of authority present in the draft proposal. For example: the third line of authority rested on a "costs" argument, so far unmentioned in this form. According to this, the regulation of part-time employment was clearly directed towards the goal of the free functioning of the common market:

*Whereas there are still significant differences between the Member States concerning the implementation of the principle of non-discrimination between part-time and full-time workers, and these differences can distort competition between undertakings and affect the functioning of the market.*⁷⁴

More importantly, perhaps, was the interpretation of Article 117, the main Social Policy article. A direct connection was made between the goal of Article 117 and the costs' argument, thus linking Social Policy to common market objectives. Whereas the emphasis of the content of the directive was firmly placed on the "protection" of part-time workers, the enactment of this directive was not considered in terms of social goals alone. Market goals were also present, all be they understated. This was not a clear-cut case of a Social Policy for broad social ends⁷⁵.

The content of this proposal was based at this stage, therefore, on the opinion of the Council, the opinion of the EP, the opinion of the Economic and Social Committee and the opinion of various reports and groups' viewpoints. The Commission's task here is clearly seen as one mediating between various interests and putting together a proposal which should be in the "general interest" of the Community.

⁷⁴ cf. op. cit. note 72.

⁷⁵ This will be discussed in detail in the next chapter.

The emphasis which the Commission chose was the protection of workers - in particular the non-discrimination angle. The draft directive in effect applied the "principle of non-discrimination between part-time workers and full-time workers" in the area of holiday pay, redundancy pay, retirement benefits, working conditions, rules governing dismissals, participatory rights, vocational training, social facilities and medical care. In addition, there were some provisions governing the movement of part-time workers into full-time employment and an unqualified entitlement to a written contract of employment.

The application of the principle of non-discrimination to the area of pay was generally understood to be endorsed by this original directive, although the wording was ambiguous⁷⁶. More importantly, its application to the area of statutory and occupational social security schemes was to be restricted by allowing existing national thresholds for entitlement to stand, thus severely reducing its application in this area: eg. the UK's LEL threshold would have remained untouched by this directive, as would the French 16½ hour social security benefit entitlement threshold. Interestingly, although this directive was concerned with protection, it was clearly not concerned with this alone.

This draft proposal was submitted to the Council by the Commission on 4th January, 1982. Subsequently, both the ECOSOC and the EP made their opinions on its contents known⁷⁷. It is suggested above that the EP would attempt some kind of alignment of interests to ensure adequate representation in the content of proposed law: it would try to align group interests with the "general interest" of the Community. This can be seen to have happened here. The EP considered this proposal from the point of view of both "women" and "part-time workers" as groups, within the context of social rights generally. This is indicated by looking at the EP Committees appointed to review the proposal: the Social Affairs and Employment Committee and the Situation of Women in Europe Committee. Importantly, the EP also

⁷⁶ The importance of the application of the principle of non-discrimination to direct pay has been discussed already in this thesis and it is apparent that the wording in this area should be clear to be effective.

⁷⁷ cf. Doc. CES 284/82 and EP Document 1-540/82 of 3rd. September 1982.

connected this directive with goals other than social goals: this is indicated by the fact that the Economic and Monetary Affairs Committee reviewed the document in this light.

On the whole, both the EP and ECOSOC were in favour of the directive. Each proposed amendments, which for the most part concerned the clear application of the principle of non-discrimination to the area of pay and sought to remove, within one year, the restrictions imposed by national thresholds for its successful application to statutory and occupational social security schemes. The Commission, although not Treaty-bound to do so, in fact amended its original proposal to take account of some of the changes requested by the various EP committees. It added clearly that the principle of non-discrimination was to be applied to the area of pay. Pay was defined according to the Article 119 formula to include both direct and indirect pay⁷⁸. The Commission, however, did not amend the Article which allowed Member States to set their own thresholds with regard to the application of the principle in the area of social security schemes⁷⁹. Summarily, the Commission displayed willingness to incorporate offered amendments and co-operate with both the EP and ECOSOC on this issue⁸⁰.

The Commission then re-submitted its proposal to the Council on the 5th January, 1983. During the course of 1983 and 1984, however, this proposal was not discussed in the Council for Labour and Social Affairs⁸¹. It was not in fact fully discussed by the Council for Labour and Social Affairs until 13th June, 1985, when a policy debate with regard to this proposal took place.

78 cf. Chapter Three on ECJ interpretation of Article 119 formula.

79 I would suggest that this is an example of the Commission being cautious in respect of Member States' interests.

80 This is a clear example of the good working relationship which by this time existed between the Commission and the EP.

81 It was apparently discussed briefly at a Council Meeting in June 1982.

From interviews with officials in DGV, it can be established that the main debate surrounding the draft directive did not centre so much on the content of this proposal as on the question of Community competence to regulate in this area⁸². For most Member States, the Community did have a role to play in the regulation of part-time employment: in other words, Community competence was not called into question. However, Denmark and the UK argued against this viewpoint. The Danish argument invoked the principle of subsidiarity. The Danish Minister argued that the Danish state did not intervene in this area of law and did not, therefore, consider it appropriate for the Community to do so. The regulation of part-time employment, it was argued, should be left to the two sides of industry.

The UK Minister concurred with this view. However, the UK position went further than this. Whereas the Danes were against the appropriateness of action at Community level, they were not against the rationale that regulating part-time employment would encourage employment growth. As was demonstrated in Chapter Five, the UK position on the relation of social protection to economic growth and flexibility sees these as being essentially contradictory. The UK were, in this instance, arguing against the need for the regulation of part-time employment to meet the general objectives of the common market. This argument can be clearly seen in the following quotation, which is in fact a UK Government opinion querying the Treaty base of the proposed directive:

It has not been established that varying national provisions in this field directly effect the establishment or functioning of the common market, as the use of Article 100 requires. It is also doubtful, in view of the likely decrease in part-time job opportunities in the UK which would ensue, whether the standard of living of the workers concerned would be improved, as envisaged by Article 117.⁸³

In this manner, the UK Government could uphold both that the regulation of part-time employment at EC level would go against the UK's national interest (as it would cause a rise in unemployment) and that the regulation of part-time employment would not meet the objective of either Article 117 or Article 100. The adoption of a Part-Time Employment Policy,

82 Interviews conducted in Brussels with Officials in DGV June-July 1992.

83 House of Lords, Session 1981-1982 19th Report on Com(81)775 final: p2.

under the heading of "Social Policy", was held as being at odds with the stated objectives of the common market.

Thus, despite the initial drive by the Council for specific action in this field, nothing was done at this stage. This is an example, firstly of the power of national interests to force a complete abandonment of law, whose enactment had been agreed upon by many institutions operating at EC level (including the Council itself, in this instance). Secondly, it can be seen here that the power of the national interest is rendered even more commanding by the fact that the connection of the action being pursued to the "general interest" of the Community is ambiguous in this area. The inability of the Commission to do anything further at this stage is evidenced in the ability of the Council to shelve this proposal for good⁸⁴.

In spite of this first defeat, neither the Commission nor the EP abandoned their desire to regulate part-time employment. After the enactment of the Single European Act (SEA), a re-vitalised and re-empowered Commission emerged under the strong leadership of Jacques Delors. The Commission rhetoric was keen to stress the importance of the establishment of a "Social Dimension" to the "general interest" of the Community and the Single Market Project. The Commission, enthusiasm renewed, began to promote this concept of a "Social Dimension" to the Single Market Project. As a result of a high profile campaign, several agreements were reached on the nature of such a dimension. In 1989, a "Community Charter of Fundamental Social Rights of Workers" was adopted by eleven Member States (the UK being the exception). On the basis of this Charter, the Commission drew up a Social Action Programme, which had as its intention the implementation of the social dimension to the internal market. This active campaigning by the Commission to push the Community in a specific direction indicated a shift in power after the adoption of the SEA, with the Commission's political drive at this point rivalling (and surpassing) that of the Council.

⁸⁴ This is also an example of the situation where agreement is made in the higher European Council with regard to a general policy goal ie. the goal of job creation, but no agreement is actually reached in the lower Social Affairs Council meeting on the means to implement this goal.

This Action Programme subsequently became the springboard for action by the Commission in the Social Policy area generally. Again, the justification for Community competence had the approval of eleven Member States (but not the Council as such), the EP, the ECOSOC and many interested bodies, eg. ETUC. One of the areas for action was to be in the form of directives on the right to equal treatment with full-time workers for workers with other than full-time employment relationships⁸⁵.

In 1990, the Commission drafted three proposals relating to what had by now been labelled "atypical work": these covered part-time and temporary employment relationships. The first is entitled a proposal for a Council Directive "on certain employment relationships with regard to working conditions", the second "on certain employment relationships with regard to distortions of competition" and the third "supplementing the measures to encourage improvements in the safety and health at work of temporary workers⁸⁶". The first two only cover part-time employment relationships.

Given the reasons for the shelving of the previous proposal for law in this area, there was a real need for the Commission to present these proposals as part of the Single Market package and effectively demonstrate EC competence in this area. In the explanatory memorandum to the proposals, it is clear that the Commission was keen to establish a direct link between these directives and the goal of the Community and, in particular, the goal of the Single Market. As a result, the focus of these directives was on the costs' argument, as opposed to either the protection or sex equality angle. A shift in tactics was thus employed by the Commission, with the development of the distortion argument at the expense of the non-discrimination argument.

85 cf. Com(90)228 final: amended by Com(90)533 final.

86 A common position was formally adopted in the Council on 4th February, 1991 on this latter directive based on Article 118a.

In interviews with the Commission Expert on the atypical employment draft Directives, it was further evidenced that the purpose of these directives was one of labour market policy, ie. they formed part of the Single Market project. The Expert argued that these directives did not fall under the so-called "protection" heading, although they were still part of the Social Action Programme. Additionally, the sex equality angle was completely dropped. The Women's Equal Opportunity Unit in DGV had not been consulted on these proposals (whereas they had given an opinion on the original draft directive on part-time employment). The Expert argued that the proposals were not really about sex equality. They were not solely about women as they also covered temporary employment which, he said, contains a predominantly male workforce. The drafting of the directives was consequently placed in the hands of the "industrial relations, working conditions and labour law" department in DGV.

It is clear that these directives were considered by the Commission to be about Single Market Policy and the difficulties of competition in this regard, especially from the technical point of view of attempting to harmonise labour law provisions at EC level. Unmistakeably, therefore, the Commission had tailored its argument to ensure agreement in the Council. The result was two separate proposals, whose sum content had been much reduced.

The content of these proposals amounted to the application of the principle of non-discrimination in a very limited number of areas. To begin with, the principle of non-discrimination in the area of direct pay was not applied in either of them: it was made clear to the Commission Expert that pay as such was to be left out, whereas indirect pay was to be retained in some form. The first proposal, based on Article 100⁸⁷, retained the more protectionist element of the original 1981 proposal. Here, the principle of non-discrimination (although this term was not actually used in either proposal) was applied to vocational training and representative rights. Apart from other provisions relating to rules of worker mobility, which were also reduced, the draft directive interestingly contained two areas where

87 This would require an unanimous vote in the Council in order to be enacted.

part-time employees would have equal rights with full-time employees, irrespective of the *pro rata temporis* rule. The first was contained in Article 3, which reads as follows:

Employees [are] entitled [to the] same treatment as workers employed in full-time employment of an indefinite duration as regards benefits in cash and in kind granted under social assistance schemes or under non-contributory social security schemes.

The second provision granted workers equal access to social services made available to other employees. The proposal, on the whole, amounted to a much weaker form than the earlier draft directive. I will return to Article 3 in a moment.

The second proposal was based on Article 100a⁸⁸: ie. it was directly connected to the Single Market Project. Its link rested on the argument highlighted earlier in relation to "costs" connected to the employment relationship. In the explanatory memorandum, the Commission argued that the harmonisation of atypical employment relationships was a prerequisite to the successful functioning of the internal market. The Commission noted the increase in part-time employment over the period 1982-88 and stated...

Clearly if a Member State can produce lower labour costs than the other Member States - yet that difference does not result from factors such as those examined above, but is due to segmented labour markets having different costs for the same type of work, attributable solely to the different rules applicable to the different types of employment relationships - it will have a comparative advantage which cannot be considered permanent and runs counter to common interests.⁸⁹

The main rules governing the employment relationships concerned and the extent to which the way they are handled in one or more Member States may cause distortions of competition vis à vis other Member States can be broken down into three categories:

- direct costs from social protection
- costs resulting from social protection
- indirect wage costs connected with the features of the employment relationship.⁹⁰

This argument forms the basis of the much discussed "Social Dumping Theory", which will in turn be discussed in detail in the next chapter. The Commission argument above was simply that the principle of non-discrimination had to be applied in certain areas of working

⁸⁸ Any law enacted on the basis of this Article must be done in accordance with the co-operation procedure. This means that the Council must firstly reach a common position on this directive, before referring it to the EP. In the last instance, a qualified majority vote would be required in the Council.

⁸⁹ cf. Com(90)228 final: p13.

⁹⁰ *ibid.* It should be noted that, according to this argument, the present difference between UK and French Part-Time Employment Policy could give rise to a distortion of competition as a result of the difference in application of the principle of non-discrimination between full-time and part-time workers.

life (eg. indirect pay) uniformly throughout the Community, in order for the Single Market Project to be successful. Consequently, the second draft directive was concerned with the application of the principle of non-discrimination in the area of statutory and occupational social security schemes and dismissal and seniority allowances. In this manner, the relation of social security costs to the principle of non-discrimination now had a distinct Community understanding.

As part of this approach, a Community standard was to be applied in the form of an eight hour threshold entitlement to the rights laid down in both directives. This, in effect, makes these directives more far-reaching than the 1981 directive in their application of the principle of non-discrimination in the area of social security, if the national provision is based on the number of hours worked. Perversely, therefore, the focus of the directives on the economic requirement of the market resulted in a higher level of protection for part-timers in this area.

Again, the EP offered its revisions, some of which were then incorporated into an amended Commission proposal and sent to the Council. The ECOSOC opinion was also in favour of these directives and requested few amendments⁹¹. The ECOSOC argued generally that a Community regulatory framework was necessary in this area, but stressed the role of collective bargaining in the creation of non-standard job forms. ETUC also agreed with the proposals and pushed for the use of Article 100a to allow the EP a chance at co-operating in the decision-making process⁹².

The Social Affairs Council meeting was held in January 1992. The first set of difficulties encountered stemmed from the contents of the directives. The main problem concerned the 8 hour threshold. On close inspection it was realised that most Member States,

91 cf. CES (90) 1066.

92 ETUC 20-06-1990.

even those who already applied the principle of non-discrimination in their national labour law, also have social security thresholds which are far higher than 8 hours per week. I have shown that this is the case in France, where although the principle of non-discrimination is applied in the Labour Code, the Social Security Law still operates a weekly 16½ threshold for the granting of some of its benefits. This, it was found, was also true of Germany, where there is a 15 hour weekly threshold for sickness and an 18 hour weekly threshold for pensions and unemployment. Summarily, it was argued that the application of a Community threshold which was lower than these would have involved a large amount of extra cost⁹³. On the whole, therefore, the Social Security aspects of these directives were extremely problematic.

Another example of disagreement concerned the wording of Article 3 in the first directive and its relation to the application of the principle of non-discrimination to Social Security Schemes in the second directive. No-one in the Council meeting could understand the difference between these two Articles, including the Commission Expert present. This disagreement highlighted a problem of badly drafted proposed laws. In interview, the Commission Expert said that he had no idea what "*benefits in cash and in kind*"⁹⁴ meant exactly (he had not personally drafted the proposal). In fact, he considered the directives to be appallingly written. His view, therefore, was that these directives are "history" (it is to be noted they were not presented to the Social Affairs Council Meeting on 24 June, 1992). The Belgian Presidency presented new proposals to the Social Affairs Council on 12th October, 1993. The Commission Expert is also in the process of drafting new directives and it will be interesting to see the form that these are going to take⁹⁵.

93 It is clear that it was not only the UK who were against these directives [although the Commission Expert has an enormous file from the Department of Employment criticising these directives], but reluctance came from all round. German reluctance [in my view] is particularly significant.

94 cf. op. cit. note 89: Article 3.

95 The main problem highlighted here was the question of which Treaty base to use. The question of whether the proposals might come under the Social Agreement signed at Maastricht was raised. This uncertainty over future legal bases for Social Policy was in fact raised by all Officials interviewed.

The question of badly drafted law is a difficult one. It could be argued that badly drafted law is a symptom of the type of power structure which has developed. The constant need for the Commission to tailor its proposal to the Council has meant that drafted proposals tend to satisfy national interests rather than follow a plan of action as such. This argument would see a more serious problem lurking behind loose wording.

The types of disagreement over the Social Security threshold form part and parcel of the normal procedure of decision-making and have the potential of being resolved, eg. a higher threshold could be set, which would be acceptable to some Member States. The far more serious debate which took place in the Council meeting, however, involved a clash of interests which could not be overcome. This centred on the UK position on EC competence in this area, which again was based on the UK view that there was no need for social regulation for the successful functioning of the single market. To this end, the UK challenged the use of Article 100a as a viable Treaty base to the second proposed directive⁹⁶. The UK Government was very stubborn on this point - its position on the relation of social protection to job creation is clear and it is one which is well documented in the second section of the thesis. Its challenge amounted to a very real problem for the Community firstly, because of the way in which consensus politics has developed - what is in the "public interest" of one nation state takes paramount importance over all other interests - and secondly, and linked to the first point, because of the fact that there is no clear relationship of action in this area to common market objectives as spelled out in the Treaty. The problem seems to hinge, therefore, on what is considered to be of "general interest" to the Community in the Social Policy area. This will be explored at great length in the next chapter.

It is important to realise that the co-operation procedure, which should have come into operation with regard to the second proposal, has not even been embarked upon because of the challenge to the Treaty base, coupled with the inability of the Council to reach a

⁹⁶ If successful, this challenge would remove the need for the co-operation procedure to come into operation and ensure unanimity decision-making in the Council.

common position. The EP is consequently only involved with these directives as a result of its good working relationship with the Commission. What this amounts to is a clear example of a situation where the Commission and EP and ECOSOC (and also many other bodies) are in agreement over the necessity for Community law in the "general interest" of the Community, yet are unable to get such a law enacted in the Council. The power of the Council and its absolute control over the outcome of legislation in this area is striking.

Once again, the principle of non-discrimination can be seen as embodying both economic and social aspects. In the above description of draft legislation the same principle is used in different forms apparently to meet both economic and social goals. The purpose of the enactment of the principle of non-discrimination shifted emphasis from being about protecting workers and creating a true reserve of jobs, to being essential to the successful functioning of the market: the shift in emphasis was further evidenced by the use of different departments in DGV to be responsible for the various drafting stages of the policy. I also detected a shift in emphasis in the importance of the gender of the part-time employee. The nature of part-time employment was first seen as having a sex equality angle. This was not even mentioned as an issue in the second draft directives and, indeed, was positively denied by the Commission Expert himself. This all resulted in two very different forms of the principle of non-discrimination, but neither form is exactly like either the UK or French model.

This change in usage of the principle of non-discrimination makes it difficult to pinpoint exactly how part-time employment is being conceptualised at EC level. In the early 1980s, the Commission understanding of it as a segmented employment was more easily visible than the nature of the Commission understanding of it today. It would seem as though its regulation today is considered solely in terms of the social dumping or distortion argument, rather than in terms of the need for any re-evaluation of it by EC law, ie. the policy is seen clearly in terms of the market rather than in terms of "equality". Consequently, the conceptualisation of part-time employment at EC level, as at national level, is seen to be

determined by a wider understanding of market functioning generally. Such a conceptualisation is described in great detail in the next, and final, chapter of the thesis.

Levels of Explanation

The above description can be seen as an example of the problems faced by part-timers in campaigning for improved employment rights. Similar problems can be found in the area of sex equality⁹⁷ and the attempts at securing social rights generally at EC level. For example, Hoskyns⁹⁸ documents how, although agreement was reached in the area of Sex Equality Policy, the content of the proposal was much reduced by the Council, to such an extent that the result was very weak law. A very good recent example of the same occurrence in the general Social Policy area is the history of the draft directive on the "reduction and reorganisation of working time"⁹⁹. The content of this directive has been so reduced by Intergovernmental disagreement that it is now inherently contradictory¹⁰⁰. By way of offering explanations, I intend to re-consider the points raised throughout the Chapter.

Explanations for Enactment in Sex Equality Area

Hoskyns, writing on Sex Equality Policy, reveals the problems faced by women at Community level in securing a form of equality which moves beyond formal equality towards the goal of substantial equality. Nevertheless, despite numerous difficulties highlighted, Sex Equality Policy remains in her view "*one of the better developed areas of EC social policy*"¹⁰¹. Hoskyns raises the interesting and important question of why this should be the case, especially given the double disadvantage faced by women at Community level (both as

97 cf. Hoskyns, C. (1985) and (1991); Luckhaus, L. and Hoskyns, C. (1989).

98 cf. Hoskyns, C. (1985).

99 Originally Com(83)453 final.

100 cf. European Report No.1863, 1993.

101 cf. Hoskyns, C. (1991): p1.

women and as workers). Two of the points she raises to solve this puzzle do have an immediate relevance to the theme in question here.

Her first answer rests on the importance of a Treaty base, in the form of Article 119. As was seen earlier, the European Commission must establish a legitimate reason for proposing legislation in a policy area; legitimisation is found in the first instance by referring to the Treaties. In the second instance, legislation or Action Programmes endorsed by the Council can be used as effective springboards for further laws in a particular field: Article 235 of the EEC Treaty is designed to this end. In this way, Article 119 paved the way for those who were claiming rights to equal treatment to push for legislation in the area of pay, in the first instance, and then other areas in the second, using the Social Action Programme (endorsed by the Council in 1974) to add weight to their claim. As a result of this action, the first three Directives creating the initial phase of Sex Equality Policy at Community level were passed. The interpretation of some of the Articles in these directives by the ECJ led to the passing of a directive on occupational pension schemes, and for further clarification on the directive on self-employed women and men and women in agriculture. Thus, the first impetus set the precedent, from which other arguments could be made.

Her second point concerns the importance of political awareness "outside" the Community system, which can influence policy decisions. She establishes a relationship between the development of women's rights' policy at EC level and the second wave of feminism; Hoskyns makes the point very clearly that to begin with women's rights were secured by pressure from outside the Community structure, through mobilised autonomous action by women at national level. At this stage, "institutionalisation" of the claim occurred; this resulted in the setting up of the women's bureau in DGV, the formation of the Women's committee in the EP and the structuring of women's networks at a horizontal level. These institutions in turn have been able to continue campaigning on behalf of women and ensure that sexual equality as an issue is not ignored. In this way, loopholes or lack of power in the

Community system as evolved under the Treaties have been compensated for by additional institutions campaigning for specific policy goals¹⁰².

Explanations for the Non-Enactment of a Part-Time Employment Policy in the Social Policy Area

The reasons offered by Hoskyns can be reversed and used as the basis for examining the failure of the Community to regulate part-time employment. The first relates to the Treaty base of the proposed law. As has been demonstrated, the ability of the Commission to enact law in the area of part-time employment has been greatly hampered by the weakness of Article 117 and the ambiguity over Treaty authority for action in this field. The interpretations made of Article 117 will be explored in more detail in the next chapter¹⁰³. In addition, although the Commission has used Social Action Programmes as springboards, it would seem that these do not carry the same weight as the Treaty Articles themselves. In fact, the Social Action Programmes have not proven to be reliable effective bases for ensuring the enactment of a Part-Time Employment Policy: I argued that the invoking of a "national interest" can effectively be used here to prevent progress in this manner.

The second explanation for the lack of a Community Part-Time Employment Policy is located in the development of the EC institutional power structure. A weakened Commission and a comparatively weak EP have been unable to compete with Member States in this area. I have shown how the Commission has been unable to initiate new policy in the "general interest" of the Community and also how the EP is too weak a body to really push for implementation of law in this field. I also pointed out that the European Council does not

102 Her third point recognises the activism of the ECJ in establishing concrete rights for women and finally, she comments on the "customary downgrading of issues to do with women [which] acted to facilitate rather than restrain policy" (cf. op. cit. note 101: p4). With regard to the ECJ, I would argue that the ECJ's rulings on indirect sex discrimination and part-time employment is restricted in the UK by the national courts' application of the "objective justification" test. The positive influence such ECJ rulings might have on the EC decision-making process is hampered by the confusion surrounding the exact content of the application of the principle of non-discrimination between full- and part-timers in the Member States by these means, ie. through Sex Equality Law.

103 There are in fact similarities between Article 119 and the rest of the Social Policy Title which would go some way to explain the commonalities between the part-time directives and those directives based on Article 119 which have been blocked in the Council throughout the 1980s. This whole subject will be discussed in greater detail in the next chapter.

make implementation decisions. Additionally, there has been no real pressure from outside the immediate Community system to compensate for these internal weaknesses. No real pressure has been placed on the Council of Ministers to enact the principle of non-discrimination and grant part-timers *pro rata* rights with full-time workers. In particular, there has been a general weakness of those institutions representing workers' rights, especially ETUC, in pushing for law¹⁰⁴. A further problem of access for other interests thus presents itself.

In short, the body which could move the Community forward, ie. the Council, has evolved a process of decision-making which does not lend itself to resolving the very large question of the relation of the Social Policy to the Single Market Project or to Treaty objectives generally. The result is an uncertainty over the future nature of a Community Social Policy and this in turn is exacerbated by the lack of clear direction in the Treaty.

Conclusions

This chapter explored some of the reasons why the Community does not have a Part-Time Employment Policy. One of the key explanations lay in the development of the institutional power structure which was briefly explored by looking at the decision-making procedure. Examples from attempts made to enact a Part-Time Employment Policy were given, alongside findings from interviews with DGV officials.

The chapter demonstrated that the growing power of "national interests" and the weakening of other interests was indicated by a weakened Commission and the effect this has on other institutions, eg. the European Parliament. There appeared to be a general problem of lack of representation of interests other than national interests at Community level in the making of law. This problem manifested itself as a problem of access to the decision-making

104 cf. op. cit. note 27.

process. It would seem that the power structure, as it has developed, is more accessible to certain richer interests, eg. the interest of business, than it is to less powerful groups. The function of the EP within this context was to represent the views of individuals, minorities or, for example, regional groups whose voices are not otherwise heard. If these groups are already at a disadvantage, then why make this even more so through a procedure which can guarantee only a relatively small chance of enabling their proposals to become law? The net result is that the internal power structure at Community level works to the disadvantage of those campaigning for social protection rights generally¹⁰⁵.

But, the development of the power structure as an explanation was not taken in isolation. On the contrary, it was seen that the importance of the power structure was pertinent precisely when the connection between the action to be taken and the Treaty objective was unclear. Where the action taken was in the name of the "general interest" and the connection to the Treaty objective was contestable, the power of the "national interest" was even more marked. This highlighted a problem of moving the Community forward in the Social Policy area. The result is a stunted development of Community Social Policy in comparison with other policy areas.

In summary, the Chapter raised the question of how far Member States can integrate in the Social Policy area under the present institutional structure. This question becomes even more pertinent after the signing of the Maastricht Treaty. Firstly, the Council of Ministers regains power according to this Treaty¹⁰⁶. This is particularly true of the Social Policy area, where Commission power remains uncertain. Secondly, the present economic climate is such that the notion of the "general interest" of the Community is bound to come under strain - in periods of EC recession the Commission always comes under great political pressure. On these two counts, therefore, the Commission finds itself once more in a weakened position.

105 Where interested groups have managed to be creative, it is primarily their action from outside the Community which initiates new policy. cf. Brewster, C. and Teague, P. (1989).

106 The net gainer of power is arguably the European Court of Justice, which will have to sort out the contradictions in this Treaty and especially the ambiguous nature of the Social Agreement.

Finally, some conclusions can be made on the nature of the principle of non-discrimination. The principle of non-discrimination was seen once again to reflect the nature of part-time employment, ie. it was about social and economic shapes - this was apparent at Community level as much as it was at national level. At Community level, the enactment of this principle was placed under the heading of "Social Policy". In the UK, such a labelling implied a denial of the economic need for part-time employment by employers. This, however, was not exactly the case at Community level, where the regulation of part-time employment was given as a prerequisite to successful free market functioning. The label "Social Policy" seemed to cover policy with both social and market goals. This finding will be explored in great detail in the next and final chapter.

CHAPTER SEVEN - "ECONOMIC AND SOCIAL DYNAMICS OF EUROPEAN COMMUNITY SOCIAL POLICY"

Introduction

In examining the reasons explaining the lack of a Community Part-Time Employment Policy, the previous chapter isolated a number of ambiguities connected to the "Social Policy" area. In the first place, it was seen how, although the aim of the proposed part-time employment regulation changed from one of "social protection" to one of ensuring "the successful functioning of the single market", draft part-time employment policy continued to be located under the "Social Policy" heading. This in turn highlighted a more general uncertainty about the connection between EC "Social Policy" and broader Treaty objectives, especially the establishment and functioning of the common market.

In the second place, these perplexities seemed to be linked to the notion of the "general interest" as pursued by the Commission, on the basis of views given by other institutions, eg. the EP, the ECOSOC, ETUC and, at times, the Council or European Council itself. It was seen that the "general interest" meant more than just acting independently from "national interests": it was also somehow connected to Treaty objectives or justified by reference to Treaty objectives. Consequently, a more detailed understanding of the "general interest" is called for.

This chapter will explore the connection of EC "Social Policy" to Treaty objectives, thereby reaching some understanding of the "general interest" of the Community in the "Social Policy" area. It will do this by examining in detail the texts of EC discourse on Social Policy.

This exploration is rendered even more compelling by the fact that recent debates surrounding the social dimension of the internal market have often been presented in terms

of political conflicts between those who wish to pursue social goals and those who wish to pursue the economic goal of the free market. This presumed opposition between the "economic" and the "social" is also inflected through a variety of other conflicts. Maximalists are seen as being opposed to minimalists. Those in favour of a "humanitarian Community" are pitched against advocates of big business, social promoters/welfarists doing battle against free-marketeers. Questions of sovereignty and Community competence are also invoked, as clashes of principles appear to be paramount.

It will be argued here, however, that these political debates are highly misleading with regard to EC discourse on Social Policy. In particular, these debates make dubious assumptions about the relation of the "economic" to the "social". Firstly, they assume that the "social" goal is separate from the "economic" goal. Secondly, they assume that an argument has at some point existed which gives the "social" priority over the "economic".

But, it will be seen in this chapter that, on the contrary, the "social" and the "economic" are interrelated, and always have been, in EC discourse on Social Policy. Moreover, it will be shown how there are competing models of interrelation between the "social" and the "economic": the Article 2 model and, what I have termed, the reverse image of this model. Indeed, true conflicts in EC discourse on Social Policy are seen to be between these two models. Finally, I shall be examining how in all arguments in EC discourse on Social Policy, the "economic" retains priority over the "social".

The Texts of EC Discourse on Social Policy

The term "European Community (EC) discourse" as used here refers to the language used in policy-formation and in the making of law: the term "discourse" itself implies a non-unified approach. It does not include the way primary and secondary texts have been interpreted by the European Court of Justice (ECJ) through cases. It is seen as being separate from national views and linked to the notion of the "general interest" of the Community. It

encompasses the discourse originating from the main decision-making and policy-formation bodies: the European Commission (the Commission), the European Parliament (the EP), the Council of Ministers and the European Council¹. The discourse is simultaneously one of the believed intention² of the Community and one of the assumed achievement³ to date by the Community. In other words, the achievement is present, although perhaps hidden, in the intention and vice versa. The discourse to be explored in this chapter is thus one based on ideas of what the Community is and what it can be. This discourse has its own interpretations of the terms used in the Treaties signed by the Heads of Governments or States, in subsequent laws or programmes adopted by the Council of Ministers in the name of the "Community", in Council opinions/recommendations, in related discursive documents, and in legal judgments. It uses these interpretations to argue the creation or non-creation and the character of the policy. The discourse is thus found in action programmes intended to form the basis for further laws, in the preamble to Treaties and Charters, in the explanatory texts preceding draft and actual laws, in reports and documents emanating from the institutions on the direction and content of policy and in statements made on policy-formation⁴. There will obviously be conflicts of opinion between and within the institutions and these will be indicated as the chapter develops.

1 This chapter does not explore the character and functioning of these institutions in relation to one another. cf. Chapter Six of the thesis: Nicoll, W. and Salmon, T. (1990); Nugent, N. (1991).

2 The intention of the Community is not a neutral idea: it is itself based on the interpretation of the Articles in the Treaties.

3 The word "assumed" is used here as a qualifying word on the basis that not all Community proposed action or law has been physically monitored or assessed "in action". Thus "achievement" could mean anything from «an idea which has been agreed to at Community level and incorporated into the Community "way of thinking"» to «an idea, agreed to at Community level, and in operation at all levels down to the level of the individual».

4 The texts used in this chapter are: Social Action Programme 1974 (SAP), Council Resolution of 21st January, 1974, concerning a SAP, "Social Europe" a Commission Publication, the Community Charter of Fundamental Social Rights, the European Parliament's Resolution on the CCFSR (Doc. A3-69/89); Com. (90)228 final: proposal for a Council Directive on certain employment relationships with regard to working conditions and a proposal for a Council Directive on certain employment relationships with regard to distortions of competition; Com (91)228 final: proposal for a Council Recommendation on the convergence of social protection objectives and policies.

Article 2 EEC Treaty - Conceptual Model

European Community discourse is generated by the concept of a European Community. The "model" Community, as presented in the EEC Treaty, is based on a list of "principles", fundamental to the ideal Community, which are to be respected at all times in the drawing up of legislation in those areas subsequently delineated in the Treaty texts. The main principle on which the conceptual model is founded is contained in Article 2, EEC Treaty⁵. Article 2 reads as follows:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

The basic conceptual ideal of the "Community" is thus one which contains an intention to make life somehow "better". The actualisation of the ideal is to be realised through collective action: this is made explicit by the way the passage opens using "The Community" in the sense of a collective being. Collective action is to be channelled through the institutions established by the Treaties. The model of the "Community" is quite clear in this respect in that it encompasses the setting up of a common market in order to gain some kind of collective benefit: it is a pooling of resources through an institutional structure for "the greater good of all", the idea of the "all" being contained in the word "balanced" and implied in the phrase "the standard of living".

The simple conceptual model of the "Community" is seemingly one which encompasses two goals: an "economic" goal (ie. the establishment of a common market) and a "social" goal (ie. the improvement of "life" for all). Article 2's explicit logic is such that the establishment of the market is the first stage to the attainment of the expected advantages, ie. it is a prerequisite to a "social" outcome. Thus, although the model promotes both "economic" and "social" goals, there is in fact a causal relation between the "economic" and the "social".

⁵ All references to Articles will be references to Articles in the EEC Treaty, unless otherwise stated.

Specifically, the "social" here is seen as consequent on the "economic", as "social" benefits are expected to flow from "economic" expansion and harmonisation in the manner of a by-product or result.

The possibility of reaching the desired outcome, as postulated by Article 2, is assumed. The model expects that the establishment of a common market and the "approximation" of "economic" policies will *of its own accord* bring about the desired outcome. In this way, Article 2 describes a self-generating model. Thus, not only is there a causal relation between the "economic" and the "social", but a temporal relation is also implied. Positive action will need to be taken in order to set this in motion, but Article 2 sees "social" benefits as flowing from the operation of the model over a period of time. In this manner, immediate intervention is envisaged, but it is one which is designed to "create" the common market and establish the "economic" conditions necessary for its effective functioning.

The immediate and most obvious potential problems which arise from this model are as follows. Firstly, there might be a need for some kind of "social" intervention purely in order to establish a common market as envisaged as a free market, ie. some kind of "social" policy or legislation could well be necessary in the general setting of this model in motion. Secondly, given the requirement for "balanced expansion", some "social" intervention may be required if uneven "economic" development occurs once the market is functioning. Moreover, if this uneven "economic" development causes great "social" differentiation and actually interferes with the free market, there might well be a further need for social intervention.

Briefly, the Article 2 model, understanding as it does a causal and temporal relation between the "economic" and the "social", obscures its own mirror image by its very crudeness. It is this reverse image which will now be explored by reference to the Social Policy Title in the EEC Treaty.

Social Conditions for the Creation of the Internal Market

The phrase used in Article 2 "by establishing a common market" is non-specific. Article 2 does make specific reference to "economic policies", but, in the main, the areas needing to be regulated by Community Law in order to achieve this objective are outlined in the rest of the Treaty Articles. As understood by the Article 2 model described above, the distinction between the "economic" and the "social" seems clear. Yet the question can be raised as to whether or not intervention is envisaged in the "social field", given that there is a separate "Social Policy" Title. Specifically, what function does the "Social Policy" Title in the Treaty serve and how does this relate to the idea of the "economic" and "social" goals as presented in Article 2?

The "Social Policy" Title

Title III of the EEC Treaty is the Title concerned with "Social Policy": this is divided into two chapters: the first chapter dealing with "social provisions" and the second explaining the purpose and operation of the "European Social Fund". Two Articles, Article 118a and Article 118b were added by the Single European Act (SEA). A new Title V on "Economic and Social Cohesion" was also added by the SEA, Economic and Social Cohesion being the EC phrase for what is more commonly known as "Regional Development". All this amounts to a not insubstantial set of Articles dealing with "Social Policy". At first glance, therefore, it would appear as though the Treaty upholds an independent commitment with regard to the "social" goal, through the potential for direct "social" intervention at EC level.

Let us explore this point further. A simple political reading of the "Social Policy" articles would involve the accentuation of the oppositional relation of the "economic" to the "social". This type of reading would concentrate on the importance attached to the "social" as opposed to the "economic" goal, by exploring the degree of commitment to direct "social" promotion. An expected humanitarian argument, fostered in accordance with such a reading, would perceive a potential for some form of direct "social" intervention. This would be based

on the mandatory status of some of the Articles. Such an argument would then maintain that there is a weakness in the Treaty in that, although there appears to be space for direct "social" promotion (with reference to Article 119, for example⁶), the main Article (Article 117⁷) does not contain a clear and precise mandate to enact law or policy in this area for the sake of the broad "social" goal. On a political reading, this weakness would be conceptualised as a contradiction or hypocrisy on behalf of the Member States and would lead to the accusation that the "social" in the Treaty of Rome is about "social" goals which are never acted upon. Summarily, the strong tension between the free-marketeers and the welfare interventionists would be the focal point.

Although this political reading highlights a well known tension between the "economic" and the "social", does it in fact highlight the most important one? Are there not other tensions between the "economic" and the "social" in evidence? What will be argued here is that there are indeed other tensions existing between the "economic" and the "social" and that these are only revealed by an economic reading of the "Social Policy" articles. Moreover, it will be realised that this economic reading is the KEY reading of the "Social Policy" Title as it uncovers the most significant tensions, themselves obfuscated by the political reading. Let us explore this further.

The economic reading understands that within the "Social Policy" Title there is some mapping of the Article 2 model (eg. within Article 117), but that there is also a reversal of this model which demands the regulation of certain social conditions for the "establishment of the common market". The economic reading poses the reverse image of Article 2, namely that some "economic" aims are dependent on some "social" intervention, ie. that some "social" intervention is needed for the "market". Further, these concerns with regard to potential need for "social" intervention for the "establishment" of the market are reflected by two important

⁶ This Article is discussed further on in the chapter.

⁷ Article 117 is also explored in detail later on in the chapter.

factors: firstly, by a narrowing of the scope of the "social" to the market and, secondly, by the mandatory/non-mandatory status of the Articles.

With regard to the former, whereas Article 2 spoke in terms of an improvement in life for all, this has been replaced in the "Social Policy" Title by reference to an improvement of the "situation" of workers. The word "workers" is used throughout: the "men" and "women" referred to in Article 119 refers to men and women at work; similarly, the areas listed under Article 118, under the heading "social field" refer to "work", with the possible exception of the matter named "social security" (this latter category has subsequently been interpreted as referring to the internal market by the EC discourse which deals with it in conjunction with Article 51 - free movement of workers). The European Social Fund is also aimed at "workers"⁸.

With regard to the second point raised above, it is the phrasing of the main body of the sentence reflecting intention of Member States which must be noted. For example, instead of agreeing to "do" something in this area, Article 117 states quite categorically that "*Member States agree upon the need to*" do something; similarly, Article 118b and Article 120 use the words "*shall endeavour*" and Article 121 the following; "*the Council may*". However, Article 119 differs in that it issues a command to maintain the principle it endorses. Article 122 and the Articles pertaining to the Social Fund also contain regulatory obligations. Thus, some Articles are intent on action, whereas others are not.

From the above, it is clear that the "Social Policy" area relates specifically to the labour market by its insistence on "workers", "work", "working environment" and from this it would follow that already a shift in meaning has taken place within the Treaty from the idea of a "social" goal in Article 2, and the use of the word "social" in the "Social Policy" Title. In addition, although the "Social Policy" section does not always confer a precise Treaty

⁸ It is also to be noted that the EC discourse has concentrated on the free movement of workers, opposed to persons.

obligation to enact policy in this area, sometimes it does. Furthermore, a certain amount of legislation based on the mandatory "Social Policy" articles has been passed and is in force throughout the Community.

So, summarily, some "social" intervention is mandated and this is "social" action which is connected to the market in some way. The economic reading would explain this privileging of some of the Articles by demonstrating that those Articles which advocate legislation contain provisions which are linked with the "establishment of the common market". Let us explore this with reference to Articles 118a, Article 119 and Article 123, all of which contain clear directions to regulate, and Article 117, which does not.

Article 118a, Article 119, Article 123 and Article 117

Article 118A refers to the harmonisation of health and safety standards of workers. Its relation to the establishment of the market is as follows. On the one hand, its purpose is to prevent distortion of competition between Member States and, on the other hand, it serves to improve health and safety conditions for workers. Its effect on competition is directly related to costs connected with the working relationship: its aim is to harmonise distortions in state interventions, which are conceptualised as "barriers"⁹. These exist as laws which permit lower health and safety standards in some Member States than in others and which, if left untouched, could allow unfair competitive advantage. Its aim, therefore, is in part "economic", in that it is related to aspects of the internal market: EC discourse on this provision clearly perceives a distortion of competition angle in relation to costs connected with the employment relationship. The usage of the qualified majority vote is also indicative of its association with the creation of the internal market¹⁰.

⁹ This term will be discussed in more detail in later pages.

¹⁰ cf. Article 100a EEC Treaty.

The economic reading of this Article thus clearly locates the reverse image of the Article 2 model, alongside the Article 2 model itself. Given the usual requirement to level up which is contained in the wording of Article 118a, it can be argued that the creation of the internal market is bringing about certain improvements. This creation is enabled by "social" intervention, which is being used to ensure free "economic" (internal market) functioning. This, returning to the Article 2 model, in turn will generate "social" benefits (market and non-market aspects, eg. better health). Moreover, the existence of the reverse image model is further indicated, according to the economic reading, by the mandate to enact law.

The political reading on behalf of social promoters would conceal the reverse image model, concentrating instead on the idea that the "social" intervention is directly creating "social" outcomes. This argument is explored further in a review of Article 119.

The inclusion in the Treaty of Article 119 has been discussed at length by writers, such as Ellis¹¹. Its relation to the establishment of a common market is complex, but similar to that of Article 118a. Its purpose is to prevent distortion of competition between Member States¹². Its effect on competition is also, therefore, directly related to costs connected with the working relationship. State interventions in the level of pay accorded men and women differed as between Member States: some national laws (eg. France) upheld a principle of equal pay between men and women, whereas others did not (eg. the Netherlands). Such distortions in State interventions were conceptualised as "barriers" which had to be ironed out, in order to prevent unfair advantage to certain Member States. Its original aim, therefore, is also "economic", in that it is related to aspects of the common market¹³.

11 cf. Ellis, E. (1991); Mazey, S. (1982).

12 This is seen most clearly by reference to the "travaux préparatoires" of Article 119. The ECJ has interpreted this Article further and understands that it also serves to combat prejudice on the grounds of gender.

13 For ECJ/legal discourse on this matter, cf. Ellis, E. (1991).

But, the political reading of Article 119 perceives in it a general principle of equal treatment of men and women. Indeed, actual and proposed secondary legislation based on Article 119 extends this principle to numerous other areas. A political reading would argue, therefore, that Article 119 has an aim which is not related to the creation of the internal market, in the form of a broader social goal in the upholding of a general principle of sex equality. The EC Equal Opportunities Action Programmes all nurture this belief. According to this interpretation, Article 119 is portrayed as having two distinct goals, one which is "economic" (removal of barriers) and the other which is "social" (non-discrimination).

Article 119 could, however, be read with reference to the reverse image of the Article 2 model. According to this reading, Article 119 contains a mandate for "social" intervention necessary for the creation of the "economic" conditions needed for the Article 2 model, which, when functioning, should result in "social" betterment (the idea of "social" betterment is based on the understanding that there would be a levelling up of standards). This reading would see the reverse image of the Article 2 model being present here. The Article 2 model is at this instance implied.

According to the economic reading, "social" intervention is once again in the form of "barrier" removal. "Barriers" amount to distortions in State interventions between Member States. However, by harmonising such State interventions, EC social intervention also has the effect of correcting actual market distortions, which were the cause of such state interventions in the first place. These market distortions, all be they distinct from state interventions, are also at this point conceptualised as "barriers", whereas they are not barriers between Member States, but barriers within the market¹⁴. In this manner, two forms of "social" intervention are detected, both of which are directly connected to the establishment and functioning of the common market. The first is concerned with a "costs" argument and the second with some form of market correction. Moreover, these two forms of "social" intervention are inextricably

¹⁴ These barriers, as I understand them, are segmentation barriers. However, they are not necessarily conceptualised as such by national state interventions, where they might be understood as resulting from "sexist practices" distorting otherwise free economic functioning.

linked, in that national market distortions can be conceptualised as common market barriers.

The same can be said about Article 123, which reads as follows:

In order to improve employment opportunities for workers in the common market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall have the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community.

A political reading of this Article on behalf of the social promoters would understand that Article 123 is all about preventing the exclusion of disadvantaged groups from the market, ie. it enables movement of these groups into and within the market. The idea of "social" action in this area would be directly linked to the "social" goal of Article 2, because the Social Fund would be seen as containing the element of "balance" in economic growth as understood by the Article 2 model. In this manner, the reverse image of the Article 2 model would be concealed.

Once again, the economic reading of Article 123 would understand that firstly, "social" intervention is seen here as being necessary for the "establishment of the common market" by enabling the "free movement of workers", ie. the removal of barriers in order to allow for the free movement of workers. Secondly, there can also be detected a "social" intervention in the form of market correction contained in this Article: again this intervention is directly linked to the establishment and functioning of the common market. Summarily, the economic reading would perceive the reverse image of Article 2 model at play here, alongside the Article 2 model itself and it would further argue that the existence of the reverse image model accounted for the intention to intervene at EC level.

Article 117 differs from the above Articles in that it does not contain any clear mandate to regulate. It reads as follows:

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

The political reading of Article 117 would understand it as being the main "Social Policy" Article. The lack of a clear independent commitment with regard to the "social" goal would be a sticking point for advocates of the type of expected humanitarian argument outlined previously. The main difficulty surrounds the ambiguity of Treaty competence to regulate in the "social" field. It could be argued that the "procedures" referred to in Article 117 include the usage of Article 235 - this Article confers on the Commission the right to draft legislation in order to attain an objective of the Community, when the Treaty has not provided the necessary powers to do so. But, even then, the actual objective of this Article remains uncertain. Consequently, a political reading might well find it difficult to pinpoint the degree of "social" intervention which this Article calls for.

The economic reading would understand this Article in a different manner. Firstly, it would note that the second paragraph reads as a reiteration of Article 2, this time with specific reference to the improvement of the "working conditions" and "standard of living for workers". It also implies that harmonisation itself will be brought about by the "functioning" of the market. The "social" here is seen as flowing from the "economic", but the scope of this "social" is confined to the market. Secondly, this Article does not specifically highlight "barriers" to be dismantled and there is no clear mandate to enact law. This would indicate that a form of "social" intervention in order to remove specific barriers is not present here. However, there is reference to a vague category of provisions, (the content of which is presumably contained elsewhere, or, indeed, to be found through some kind of research), which when "discovered" could lead to some form of action (but this is ambiguous). There is, therefore, an idea contained in this Article which understands a possible need for "social" intervention at some time in the future, possibly in the form of market adjustment. In this way, the economic reading of Article 117 would understand that it contains a possible "social" intervention which is restricted in scope to the market and whose relation to the "economic" is twofold, ie. it is dependent on the "economic" but could also be necessary for the "economic".

It can be seen from the above that the economic reading of the "Social Policy" Title uncovers certain key tensions which are hidden by the political reading of it. In the first place, it notes how the wide meaning of "social" in the Article 2 model has now been narrowed to the market, ie. the "social" in the "Social Policy" Title is qualified. Secondly, it notes how those Articles which advocate legislation contain provisions which are linked (directly in some cases) with the "establishment of the common market". The privileging of some of the Articles no longer seems random but is explained by this economic reading. The economic reading of Article 118a, Article 119 and Article 123 locates in them two types of "social" intervention necessary for the "establishment of the common market". The first is a "social" intervention in the form of "barrier" removal. The second is "social" intervention in the form of market correction. It is ambiguous as to whether the second of these interventions is allowed for in Article 117. Both of these interventions indicate the reverse image of Article 2, which understands the "social" as being a consequent of the "economic". There is according to this reading of the "Social Policy" Title, therefore, a tension existing in the Treaty between the Article 2 model and the reverse image of this model.

At this point, three usages of the "social" have been discussed. The first understands the "social" in "social policy" to be very broad and free floating, ie. "social" policy has certain desired "social" goals, which do not necessarily occur. The second sees the "social" in the Article 2 sense of a "social" outcome obtained through the free functioning of the common market. The third is revealed by the economic reading and is found in the reverse image of Article 2, ie. a "social" necessary for the "economic". The first two meanings of the "social" are familiar and the difference between them consists of mechanisms. It has been argued so far that it is in fact the third "social" which is working away here in the form of two kinds of intervention. It will now be shown that the distinction between these two latter types of "social" intervention (intervention for "barrier" removal and intervention for market adjustment) itself hints at a further tension: the tension between the "creation" and "functioning" of the market. It is to this latter tension that we now turn.

What is the Internal Market?

Article 8a - EEC Treaty

The conceptual model of the Community as contained in Article 2, can be divided into two parts: the process of setting up a common market and its subsequent operation¹⁵. The first part would entail some kind of static "creation" by the enactment of law at Community level, specifically by the Council of Ministers. The second part relies on a far more dynamic sense of the "functioning" of the market. I understand this here as "the manner in which the response to the creation is made", with decisions taken at employer level, for example, perhaps with non-binding Community policy acting as a guideline. These two parts will now be explored in turn.

In order to discuss the process of setting up a common market, it is necessary to define in a more precise manner what is in fact meant by this. This task is facilitated by the fact that the Single European Act offers a clear statement to this effect in Article 13, wherein the "common market" referred to in Article 2 of the EEC Treaty has been renamed the "internal market". This Article becomes Article 8a of the EEC Treaty and reads as follows:

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8B, 8C, 28, 57(2), 59, 70(1), 85, 99, 100A and 100B and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

The area referred to in this Article would consist of a geographical area¹⁶ composed of the Member States' territories. In this way, the "area" would have an external border to the extent that the code operating would make the distinction "EC" or "non-EC" in a binary fashion. Under the "non-EC" section there might well be a diversity of rules and regulations, but the

¹⁵ There are arguably three parts, with expected results forming the third part. This will be explored in conjunction with EC discourse itself.

¹⁶ The word "geographical" is used specifically here as an undeniable term, for the "interest" in its definition relates in the main to the exact nature of the area; is it purely economic, does it have social dimension, is it political and so on (?): answers to some of these are attempted in this chapter.

main result would be to set the European Community up as an entity in relation to the rest of the world.

In the area there will be "free movement of goods, persons, services and capital". It is apparent from Article 8a that some action is needed in order to create this space "without internal frontiers" and this is directly in keeping with the philosophy behind Article 2 EEC. The logic underlying Article 8a (this can be deduced from the wording of Article 8a) is such that the establishment of the internal market is to be executed by action which will culminate in a situation "without internal frontiers". In other words, the internal frontiers must be removed. Article 8a, as indeed Article 2, must be taken in conjunction with the other Treaty Articles, which detail the means of so doing and delineate the areas to be regulated. In this manner, although the definition of the internal market appears quite simple, with the model seemingly embodying the extreme scenario, ie. a space which allows for totally "free" movement, the interpretation of the words, in particular the word "frontiers", could lead to a variety of "internal markets".

This last observation is explored at length by Pelkmans and Winters¹⁷, where they consider three scenarios of completion of the market from the economic perspective. The first is described as an economically thorough European Domestic Market, with no differential economic significance attached to nationality, residence or national borders¹⁸. In the second, frontier controls would have been abolished, but distortions would persist. This would allow for trade in products and free movement of persons between Member States¹⁹. The third they call "1992 à la carte". This market would be like the second, but undermined by failures in fiscal harmonisation, public procurement, financial services, exchange controls and trade

17 cf. Pelkmans, Winters and Wallace (1988).

18 *ibid.*: p.88.

19 *ibid.*: p90.

policy²⁰. It will be attempted here to relate the key points they raise to the "Social Policy" area and the economic reading of it as explored above.

Market Creation

The economist would understand the word "frontiers" in terms of both "barriers" and "distortions" and view the relationship between them as follows:

*barriers to market access would be dismantled so as to give free rein to all economic transactions, whilst differences in national interventions would have to be ironed out in order to prevent the transactions from being distorted.*²¹

The result would...

*ideally entail a state of market integration among Member States in which no differential of economic significance is attached to national frontiers or the residence and nationality of the economic agents of the Member States.*²²

A simple understanding of the area referred to in Article 8a would thus remark that, once the internal market has been established, there would be no "*distinction between trade inside the UK and trade between the UK and other EC countries*"²³.

The economist's argument for barrier removal is as follows. The maintenance of barriers between Member States involves economic costs, imposing price differences between them and economic inefficiencies within the EC "area", thereby impeding intra-EC trade and commerce and hampering free competition. The Cecchini Report²⁴ describes two types of cost: those costs eliminated immediately once barriers are removed and those (much more sizeable) related to the dynamics of the market, once operating. Barrier removal, therefore, consists of a seemingly straightforward dismantling of barriers as between Member States and

20 *ibid.*: p93.

21 *ibid.*: p3.

22 *ibid.*: p4.

23 *ibid.*

24 cf. Cecchini, P. (1988): p71.

their nationals and in so doing there is an estimated saving for the Community, both at the first and second stage, coupled with a related boost to competition.

The main difficulty with the above is that although barrier removal theoretically will result in the free rein of, in this case, economic transactions, it does not adequately cope with the problem of integrating mixed economies, which raise specific issues of modes of intervention. If one takes, for example, the economies of Germany, France and the UK, it is automatically evident that they each entail a different degree of intervention by the nation state in the free reign of market forces within their own territories. Germany's (former FRG's) economy can be described as a Social Market economy (a form of compensatory liberalism), France's economy as being, to a greater or lesser extent, engineered by successive Governments²⁵ and the UK's economy of the 1980s as operating under a de-regulatory policy²⁶. Consequently, the degree with which each of these countries will intervene to redress market failures will differ²⁷. Their intervention may be highly discriminatory on grounds of nationality or, if not, it could still cause distortions of competition. So, not only will barriers need to be dismantled, but also distortions (in the form of state aids/subsidies or rules relating to public procurement, to give but two examples) will need to be ironed out through the approximation of economic policies. This point is recognised both in Article 2 and in Article 7 of the EEC Treaty. It will be remembered that Article 2 makes a specific reference to "approximating economic policies": Article 7 prohibits discrimination on grounds of nationality²⁸.

In practical terms, therefore, the removal of so-called "barriers" involves firstly, identifying where they are in national legislation and secondly, agreement in the Council of

25 Recent moves in France have been away from this model towards a more flexible form.

26 cf. Chapter Five for a comparison of UK and French labour market models, as they relate to part-time employment.

27 1980s arguments relating to the CAP are a good example of this problem, cf. George, S. (1990): 05 et seq..

28 This Article has now become Article 6 EC.

Ministers on whether to nullify this legislation and to replace it by Community law or whether to use Community law alongside the principle of mutual recognition of national provisions or, indeed, alongside the principle of subsidiarity²⁹. All of this entails collective agreement at EC level, not only on the form of the action to be taken at this level, but also on the area in which it is to be taken.

Let us develop this point further in relation to the "Social Policy Title". The main point, in technical terms, of the Commission's White Paper is its locating of "frontiers". But, the White Paper, as noted by Pelkmans and Winters³⁰, does not in fact pursue the ideal state of market integration to the full. This is explained by the tactics of this paper, which were essentially to gain agreement on the speeding up of the process of the establishment of the market through the revitalising of the 1957 objective. As Pelkmans and Winters' remark:

*This has created the remarkable political situation that broadly everyone supports the White Paper.*³¹

Problematic issues which are necessary to integration are omitted. In this way, for example, although the White Paper lists 300 items to be removed, it is in fact largely silent on labour market provisions³². The most obvious problem in the dismantling of barriers and the removal of distortions in the "Social Policy" area is, therefore, the reaching of an agreement over which laws in fact constitute obstacles to the free movement of goods, persons, services and capital. The non-mandatory status of Article 117 is a compounding factor in this, in that it does not specifically refer to the "creation" of the common market. So, apart from those outlined in Article 118a and Article 119, the definition of what constitutes a barrier or distortion by the Social field will be based on political and economic debate and negotiation.

29 cf. The Padoa-Schioppa Report on this question.

30 cf. op. cit. note 17: p4.

31 *ibid.*: p9.

32 *ibid.*: p13.

It will be clear from the above that the type of market which will be established is highly dependent on agreement in the Social field. This point is crucial when taken in conjunction with the three internal market scenarios draw up by Pelkmans and Winters. Although in the abstract barriers and distortions can be conceptualised as the same thing, in practice they are held as separate. If Member States only agreed on barriers to be removed (rather than both barriers and distortions) or, more importantly, if "distortions" were to be presented as "barriers", then an "internal market" could exist without there being any need to resolve differences in the degree of intervention permitted at national level. This point is explored in more detail later on, but is to be noted at this stage.

Market Functioning

Let us now consider the second part of the Article 2 model, ie. the operation of the market. The "creation" of the market involved some kind of intervention or action in order to set the model in motion. In the main, the "functioning" of the market involves response or reaction to this legislation at the level of the employer, the employee, the investor and the consumer. The "operation" of the market can simply be described as the supply and demand decisions taken in the light of the "creation". There will be a temporal and causal relation between the "action" and the "reaction" in the specific areas. In practice, however, the general process of setting up the market and its actual functioning occur simultaneously. This means that laws in effect will have already been responded to by the market and, according to the Article 2 model, may have even resulted in "social" benefit, eg. the Equal Treatment Directives based on the principle contained in Article 119 could be perceived in this way³³.

The "functioning" of the market, understood as "the manner in which the response is made" is not something which is determined by Community law. Non-binding Community Policy does attempt to guide the decision-makers in their response, but unless there is a strong commitment to such a policy, it will have little effect. It is evidently arguable as to whether

³³ This perception would be based on a specific understanding of the goal of these Directives.

certain content of legislation will yield a certain effect³⁴. Here, the distinction mandatory/non-mandatory is important in that the first indicates the existence of the first part of the Article 2 model, whereas the second will indicate the latter. This point is complicated further, however, by the issues raised below.

As the market functions, further "barriers" and "distortions" will be revealed. For example: much of the legislation impeding the free movement of workers, in particular in relation to their right of residence, was nullified by the ECJ after workers, who had taken up abode while working in a Member State of which they were not a national, had come across "barriers" and taken a case against that Member State. Similarly, the legendary *Cassis de Dijon*³⁵ case was fundamental in ensuring the free movement of goods. "Barriers" or "distortions" revealed in this way will in turn need to be removed, either by the ECJ or through the enactment of further legislation, in order for the whole process to be re-generated. In this manner, the "creation" and "functioning" of the market are continually responding to one another. This point is most visible in the "Social Policy" area with regard to the requirement for balanced economic expansion as required by Article 2. If uneven economic development were to occur, this could result in social differentiation, which - now considering the reverse model - could in turn interfere with the free market, by causing distortions of competition. It might, therefore, be perceived necessary to regulate in this area, rather than merely recommend non-binding EC policy, in order to get back onto the Article 2 tack. Once again, such a decision, going as it does to the heart of the role of the EC, would involve much debate.

Summary

It has been argued so far that the economic reading of the "Social Policy" Title poses the reverse image of the Article 2 model, namely that there will be need for some form of

34 cf. previous chapters on part-time employment and law.

35 cf. *Rewe-Zentral AG v Bundesmonopolverwaltung* Case 120/78 ECR (1979) 649.

"social" intervention at EC level. Two aspects of how this intervention is conceptualised have been detected: the one is for barrier removal and the other is for market correction. The tension thus highlighted between the creation and functioning of the market isolated further the two specific aspects of how the "social" is perceived to function. Through an exploration of market "creation" and "functioning", it became clear that the first relates to negative barrier removal, involving the "social" as a barrier and the second sees the "social" as being involved with economic growth and the possible need for adjustment. Furthermore, this throws light on what is often mistaken as the broad "economic" versus "social" understanding of the intervention, ie. as a "social" intervention in the welfare sense. It is argued here, rather, that this "social" intervention is within the economic priority system, ie. a "social" intervention solely in relation to the "economic". Finally, it was described how the "creation" and "functioning" of the market is seen as involving collective agreement in two main areas. The first concerns the issue of the location of "barriers" and the second concerns the need to regulate in new areas or in areas not requiring regulation by the Treaty (eg. much of the "Social Policy" area) as the market continues to function. Debate over these difficulties could also centre on the broad "economic" versus "social" argument and conceal further the role of the "social" in the European Community. These points will now all be re-examined by reference to EC discourse on the "Social Policy" Title and the debate surrounding the character of EC "Social Policy" generally.

"Economic" and "Social" in EC Discourse on Social Policy in the Early Development of the Community

There are two documents which form the basis of secondary legislation in the "Social Field" and which are in fact fundamental to any understanding of EC "Social Policy" - the Council Resolution of 21 January, 1974, concerning a Social Action Programme and the Commission's Social Action Programme on which the Resolution is based. These documents reveal the initial interpretation of the "Social Policy" area and the thrust of the EEC Treaty,

from the point of view of the "Social Policy" area. The documents will be considered in order of their conception.

The 1974 Social Action Programme (SAP) and the Council Resolution

The main objective of the Community, as laid down in the Treaty of Rome, has been to promote "social" advantages for all its peoples through balanced economic growth. This aim was pictured as being achievable through the functioning of the market alone, rather than through direct "social" intervention. There are two crucial stages in the early development of the Community which questioned the Article 2 vision. In the early 1970s, the Commission began investigating how effective the market had been in bringing about these promised social advantages. In the research for a "Social Action Programme", in accordance with Article 118 of the Treaty of Rome, the Commission found that the market was not producing "social" benefits in all cases. Indeed, for some regions and groups, social conditions had worsened. Inequalities in economic growth were seen as leading to inequalities in social standards³⁶.

It would have been unacceptable at this time to refer to these problems as inevitable consequences of the common market: no challenge was made to the notion of market benefits. Instead, these problems were conceptualised as "economic" problems and it was acknowledged that a dys-functioning of the market had resulted in social inequality. So, in this way, it was argued that a social solution was required for market problems³⁷. This conceptualisation of the problem was rendered even more compelling by the fact that some "social" policy was clearly to be used for "economic" reasons in the establishing of the common market as set down by the Treaty. An argument which saw the need for "social" intervention in the form of market correction would simply coincide with this. It could also be argued to be in keeping with the wording of Article 117.

36 cf. The Social Action Programme 1974: EC Bulletin Supp. 2/74.

37 Rather than a market solution was required for social problems.

"Social" policy was presented in the EC discourse as having "social" aims, whereas in fact it was also intended to be used in the form of market correction. This presentation was facilitated by the general objective of Article 2 and the fact that the Article 2 model indeed envisaged social outcomes. This is seen most clearly in the SAP where it is stated that:

*Economic growth and an active programme of social reform are not antithetic.*³⁸

This statement is true if the word "social" is understood in the reverse Article 2 sense: obviously, "social" action which is concerned with the "creation" of the internal market will be a precondition to economic growth, ie. the "social" described here would be the one as understood by the economic reading of this sentence. It is, however, open to dispute as to whether "social" reform, in the sense of "social" intervention for broad "social" goals and the functioning of a free market are complementary. The justification for "social" intervention given by the Commission here, and one which is accepted by the Council, would indicate that "social" at this point does hold a reverse Article 2 meaning. This is supported by the text later where the Commission goes on further to justify intervention at Community level in the social field. The following pieces are examples of this:

*It is not the Commission's aim to centralize the solutions of all the social problems of the Community ... the proposals in this [Social] Action Programme are not intended as a substitute for national policies ... On the other hand, there are problems in the social field which are common to all Member States ... the number of these problems will grow with the increasing integration of the economies of the Member States ... serious disparities in the rate of social progress and social standards between Member States could distort competition and thus retard the development of full economic union.*³⁹

From the above, it is apparent that the Social Action Programme (SAP) does not present itself as being about the dismantling of barriers: it does not seem to be proposing Community Law in this area. The text appears to be saying that the SAP is, in fact, all about solving "social problems" which are "common to all Member States"⁴⁰ and these "social" problems seem to have been connected to the broad "social" goal of the Treaty⁴¹. However, the discourse does use

38 *ibid.*: p13.

39 *ibid.*

40 *ibid.*

41 The broad "social" goal (Article 2) of the Treaty is understood here.

the word "social" in relation to the "creation" of the internal market ("social progress" and "social standards") and with the meaning "internal market aspects" (this is seen by the use of the words "distort competition"). Following from this, it can be strongly argued that EC discourse has hung the Article 2 meaning onto what is in fact the reverse image meaning of the "social". This is also apparent in the interweaving of the "creation" and the "functioning" of the market within the text. In this way, the word "social" changes meaning from one line to the next, obscuring the distinct tensions between the "social" and the "economic" highlighted previously in this chapter.

The mixing of meaning leads to an ambiguous statement by the Commission on the nature and function of the "Social Policy" area. The aim of Community level "Social Policy" or the justification of the SAP and the need for Community intervention in the social field, is either apologised for by the discourse or denied. This is reflected in the Council Resolution⁴², which also lacks direction and coherence. The following statements are examples of this:

*economic expansion is not an end in itself but should result in an improvement of quality of life as well as of the standard of living ... attach as much importance to vigorous action in the social field ...vigorous action must be undertaken in successive stages with a view to realizing the social aims of European union.*⁴³

The "social" action to be taken is in order to create the common market, ie. it is the "social" in the reversal of Article 2 model sense, whereas it is presented here as being somehow the same as the Article 2 "social". It is then presented once again in the Article 2 way further on in the text, where it is stated that...

*full and better employment ...is an essential condition for an effective social policy.*⁴⁴

42 One of the reasons given for this confusion is found in Crijns' résumé of the social policy of the European Community. Here he highlights four basic questions concerning the role of the Community in the social Policy area, which, to my knowledge, have still not been fully answered. The questions are: 1. Does the autonomous control of social policy remain in the hands of governments or should the Community develop its own social policy?; 2. Should the Community concern itself with social questions merely in so far as they distort competition or should it develop an all-round social policy?; 3. Should social policy have an intergovernmental or supranational character?; 4. Who should the Commission consult in this matter? National governments or Social Partners? These questions really centre on the larger issue of subsidiarity in the social Policy area. cf. Crijns, L. (1987): p53.

43 cf. Council Resolution of 21 January, 1974: EC Bulletin Supp. 2/74: p7.

44 *ibid.*

Here, full and better employment will be encouraged by economic growth and such labour market instruments as the Social Fund. This sentence seems to argue that in order to attain the "social" one needs the "economic", whereas the Resolution itself is actually about to propose legislation in the "social" area in order to attain the "economic". The ensuing measures arguably deal almost exclusively with the "creation" of the market, with the exception of a few paragraphs which talk of extending social security schemes to categories of persons, as opposed to workers. In this way, as with the SAP itself, all meanings of the word "social" are consolidated in the Council Resolution.

In the two texts discussed above, it is seen that the "social" is addressed as if it were the "broad social", ie. as if the "social" intervention perceived necessary were "social" intervention for the "social" goals of Article 2. However, the economic reading of these texts distinguishes a "social" needed for the "economic". This is upheld by the fact that the only aspects of the SAP which actually became Community Law at this moment in time (1970s) were those relating to the creation of the internal market⁴⁵. Similarly, the measures pertaining to the "functioning" of the labour market (ie. those measures which are not seen as obstructing free competition) have been left in the non-legally binding documents or in national jurisdiction. Interestingly, therefore, the EC discourse of policy formation uses the word "social" as meaning "market aspects and non-market aspects", but this is not echoed in the texts or scope of the legislation, where the word "social" means only "market aspects".

Further Developments in EC Discourse on Social Policy (1980s-90s)

Social Dumping Theories

The EC discourse explored above hinted in various places at the potential for "social" intervention to "help" with the functioning of the market. The belief that imbalanced growth

⁴⁵ The main exception to this is arguably the body of sex equality legislation. It is to be noted, however, that they also only relate to the "market" and do not affect discrimination outside the workplace.

might result in distortions of competition is fostered in the SAP⁴⁶. The argument upholding this view is as follows: economic growth will bring with it a demand by the employees for a higher level of social protection ("social" in this instance is used in an "employment" sense and refers to the protection of workers at the workplace). Employees would be asserting their "right" to reap the benefits of increased consumption as the demand for their product increases, thereby producing a surplus. This could be interpreted as an indication of the expected results of the Article 2 model, ie. that the "economic" will yield "social" benefit, as this demand requires some kind of negotiation at industrial level and is, in part, a response on behalf of employees to the functioning of the market. A correlation between economic growth and social protection is acknowledged in the recent Commission publication "Social Europe " containing a special report on "The Social Aspects of the Internal Market"⁴⁷, where it states the following:

*The stronger the economic growth... the greater the demand for the cover of certain types of risk will be, as the "natural elasticity" of this type of demand is greater than one. The key to more adequate social security cover is, in this case, economic growth.*⁴⁸

According to this scenario, therefore, an imbalance in economic growth will mean that, where economic growth is fast, there will be a high level of social protection, and where it is slow, there will be a correspondingly low level of social protection. Thus the document adds to the second sentence quoted above...

*and the closing of the development gap, to which the doubling of the structural fund resources should contribute.*⁴⁹

Thus, the connection is established between economic development and social protection policies.

What is the importance of this connection? One straightforward answer would be that if an imbalance in economic growth were to take place, then, quite simply, the market would

46 cf. op. cit. note 36: p30.

47 cf. Social Europe Supp. 3/90 Vol. III.

48 ibid.: p11.

49 ibid.

not be behaving in accordance with the Article 2 or Article 117 objectives, as it would only be bringing about the improvement of conditions for workers in some areas and not in others and would not be resulting in a general 'improvement-in-life' for all. So, this could be construed as a "social" problem in a kind of "humanitarian" way. However, the EC discourse does not present this as the sole problem. In fact, the text cited above presents the whole argument in the context of the correction of internal market aspects or the "functioning" of the market. What is argued is that the differences in the levels of social protection will cause distortions of competition and thus prevent the "market" from functioning effectively. This argument is termed in the discourse "the social dumping theory" and is best explained with reference to Teague's analysis⁵⁰.

According to Teague, "social dumping" describes two fears: firstly, that a divergence in social standards could lead to *"trade distortions and price wars"* as those Member States with slow economic growth (in relation to Germany in particular) may *"restrain artificially the future growth of wages and other social changes so as either to increase exports or reduce the penetration of their home market"*. This might result in higher wage status Member States reducing the level of social protection and could *"trigger cost and price reducing battles"*. Secondly, a divergence in the same could also lead to the entrenchment of a dual Community labour market, with firms locating *"complex and technical production tasks"* in (northern) Europe and *"labour intensive and low-skilled functions"* in (southern) Europe. A differing in the levels of social protection, due to uneven economic development, would cause market distortions. This in turn would affect economies of scale. Thus, according to this theory, new "barriers" are created which must be dismantled.

The Immediate Future: A Second Wave of Social Interventions?

It is argued by the EC discourse which adopts the "social dumping" theory that there must now be some form of new intervention, at Community level, in the "Social Policy" area.

50 cf. Teague, P. (1989): all quotes which follow are taken from pages 78-9.

This intervention would be in the form of new law and is understood in terms of applying minimum Community social protection standards uniformly throughout the Community. This "social" intervention refers to the second "social" located throughout the course of this chapter - it is "social" action in the form of market adjustment. The need for this intervention arises, according to the discourse, as a result of the dys-functioning of the market, which is producing greater "social" benefits in some regions and not in others. In order to correct these potential distortions, there is an understanding in the discourse that there will need to be a certain amount of new regulation in the "Social Policy" area in order to ensure that the Article 2 (and Article 117) "model" functions effectively. In other words, these distortions are presented as barriers to free market functioning.

Recent texts emanating from the EC institutions illustrate this position. For example, the EP's Resolution on the Community Charter of Fundamental Social Rights says the following:

whereas the strengthening of economic and social cohesion... is a prerequisite for the success of the internal market... need to establish this area... with a view to the completion of the internal market [must regulate in "social" area at Community level].⁵¹

Another example of this argument is found in the first recital to one of the 1990s draft directive on part-time employment policy: it is remembered that part-time employment is considered under the Social Policy heading:

whereas the completion of the internal market requires... the elimination of distortions of competition and at the same time promotion of economic and social cohesion in the Community.⁵²

These serve as two of many examples on the need for EC law in the "Social Policy" area, as offered by the EC discourse.

But, this is by no means a cut and dried case. In fact, within the discourse there is a seemingly contradictory view on the need for new law in this area, although the issue of

51 cf. European Parliament's Resolution on the CCFSR: Doc. A3-69/89.

52 cf. Com(90)228 final.

"Social Policy" is still treated as a Community issue. This view is found, for example, in the preamble to the Community Charter of Fundamental Social Rights for Workers (CCFSR)⁵³. The difference lies in the dropping of the compulsion to regulate in new areas - this is said quite explicitly in recital eleven, part of which reads as follows:

whereas the implementation of the Charter must not entail an extension of the Community's powers as defined by the Treaties.

Similarly, the main proposal on "the convergence of social protection objectives and policies" to emanate from the Commission in 1991, is a proposal for a "Recommendation" rather than a Directive⁵⁴. Point 5 clearly explains that this proposal is for a convergence strategy which is "non-compulsory". Nevertheless, it is argued in the justification, that "social protection is concerned with a number of aspects of the completion of the single market" and the text goes on to lend weight to both the "social dumping" theory and the free movement of workers position.

In this manner, this justification advocates the same position as the justification for the proposed directive on part-time employment, yet in one the need to regulate is upheld, whereas in the other the contrary is true. It would appear, therefore, that EC discourse is uncertain on the need for "social" regulation at Community level to prevent distortions of competition. In some cases, such a need is upheld, whereas in others, it is not. Moreover, it is not simply an institutional difference: in fact, it is precisely in the proposed legislation, which is composed of a plurality of inputs, where the inconsistencies are most noticeable. It will be suggested here that the answer to these apparent contradictions in the regulatory/non-regulatory status of these texts lies in the main debate surrounding the "Social Policy" area over the last few years.

The "British" Debate Surrounding the Social Dimension of the Internal Market

The main debate surrounding the "Social Policy" area has been focused on the extent of "social" intervention necessary for the completion and success of the Single Market Project,

53 cf. Com(89)248 final.

54 cf. Com(91)228 final.

ie. which "barriers" will need dismantling and why, and which areas will need regulating and why. This debate surfaced in the political sense as a debate between social promoters/welfarists and free-marketeers⁵⁵. The central disagreement of the debate is presented in terms of an either/or scenario: either "Social Europe" or "Flexible Europe". The debate itself is divided into two main points of disagreement. The first is political and essentially focuses on EC competence to regulate at all in the "Social Policy" area. This entails disagreement over the meaning of Article 117 and quarrels over whether the Treaty allows for "social" action in this area at all. The second is related to the "economic" aspect of the "social" intervention, ie. the dispute over what in fact constitutes a barrier. Although these two parts appear separate, and are adamantly treated as such by the UK Government, it will be argued here that they are in fact connected. In other words, this debate is not necessarily only the broad "economic" versus "social" debate.

The primary argument adopted by the Commission has been that some social reform would be necessary to ensure that the predicted economic results of "Project 1992" are realised. As has been seen, this has been the Commission's view since the early 1970s. The Council of Ministers, in its Resolution of 1974 agreed with this. Now, in response to the drive by the Commission, other Member States and various interest groups to regulate in this area, the UK Government has taken an obvious opposing stance⁵⁶. The UK Government's political argument has been as follows: there is no need for "social" regulation of the market as the benefits of the market will flow through to all citizens and this is, in fact, what constitutes the "social" dimension. They uphold this point by reference to Article 2 and Article 117. Therefore, they continue, the Community does not have competence to regulate in this way. Furthermore, they argue, the British Government did not agree to such regulation on signing the Treaty of Rome. Through this argument, they have attempted to entrench a political tension between themselves as "free marketeers" and the rest as "social promoters".

55 In the previous chapter, Chapter 6, this same debate surfaces on the question of enacting an EC part-time Employment Policy.

56 The UK position in the late 1980s was the most obvious position. Other oppositions have since arisen in the 1990s, but these will not be discussed here.

However, the UK Government have also acknowledged their commitment to the Article 2 "social" goal. This implies that it is not the overall objective of the Community which is at stake, but whether some "social" intervention is necessary for market reasons. Indeed, the UK Government has been arguing that "social dumping" is nothing more than an ill-grounded fear, based on speculation. They argue firstly, that it is not going to happen and secondly, that some differences in levels of social protection are inevitable. Their argument is essentially that differences in national provisions with regard to social protection do not give rise to "distortions" in the free functioning of the market. Others agree with this, namely UNICE⁵⁷. To quote from Mr. Eric Forth MP (Under Secretary of State for Employment)'s comments given to the House of Lords' select committee on the proposed EC directives contained in Com(90)228 final:

*the argument behind the assertion of distortion has simply not been there... many elements... climate, or geography, or peripherality... fuel taxes, transport costs... These can be seen on the one hand as allegedly (sic) distortions of competition, or they can be seen as elements of competition.*⁵⁸

Moreover, it is felt that the extension of regulation in the "social" area would have negative effects on the "functioning" of the market:

*[It would] hamper job creation, hinder competition within the market, damage competitiveness in world markets and put at risk all the benefits of the Single Market itself.*⁵⁹

Thus, the extension of "social" legislation is seen as hindering flexibility and incurring cost⁶⁰ with the result that there will be a negative impact on economic growth. This in turn argues that legislating in this area will reduce employment opportunities, increase unemployment and, in this way, subtract from the "agreed" objective of creating employment. This argument, therefore, does not believe that intervention in the "Social Policy" area is either necessary from the point of view of the functioning of the market or, indeed, the way to go onwards with the

57 cf. The House of Lords: 1990-91, 2nd Report on Com(90)228 final: p107, at point 6, where they cite "UNICE utterly rejects any argument based on distortion of competition".

58 *ibid.*: Q67.

59 cf. House of Lords: 1989-90, 3rd Report on the Social Charter: p9, at point 16. This statement comes from the Department of Employment's Explanatory Memorandum on the October text, para. 8.

60 John Major's comment on "social policy" just prior to the Maastricht Summit, 9th December was "can't afford the cost involved" (!)

Article 2 and Article 117 tack. Instead, it believes that the way forward is to open up the market to "free" competition⁶¹. Summarily, the UK Government's argument is one which attacks the economic justifications for the regulation of the social dimension⁶². In so doing, they can argue against EC competence to intervene in this area.

In reply to this, a counter-argument is formulated by various bodies, eg. the Commission, the EP, the Low Pay Unit, the Equal Opportunities Commission. The counter-argument points to the negative long-term effects that such a de-regulatory approach would have on the Single Market. This is argued in relation to investment, productivity, and competitiveness. It is argued that the "rationalisation" brought about by the single market may in fact work against this approach, for while the attraction of investment may well be low wages and little regulation, by that same token, there would be little to hold companies in the UK in the future. For example; the redundancy costs in the UK are the lowest in the EC, meaning that companies can leave as easily as they arrived. In this manner, UK workers can be used as secondary workers in larger companies wishing to survive periods of economic decline⁶³. The result would be no long-term investment⁶⁴.

A second argument against the de-regulatory approach concerns the level of productivity. It is argued by many that the level of productivity is more important in the long term than the level of wages. The UK at present are 20-30% less productive per labour hour than the French, for example. This view understands that training and a high level of skills are essential to sustain economic growth⁶⁵.

61 The British Government's argument contains a fundamental contradiction, which is important in its own right. At Community level, they have been denying that market distortions will occur, whilst at the same time, at home, they have been boasting the competitive advantage earned through their opting-out of the Social Protocol.

62 They have attacked economic justification for the regulation of part-time employment in National Policy, cf. Chapter 5.

63 cf. The opinion of David Rees of "The Economist" expressed in a BBC Radio 4 programme on "Social Dumping", 23-02-92.

64 "Sweatshop Europe"?

65 cf. The opinion of John Edmonds, Trade Union Leader, expressed in op. cit. note 63.

Other critiques of the de-regulatory model are concerned with a policy which obtains competitiveness through cost cutting alone, rather than through other employment factors. This critique acknowledges that although the fear of "social dumping" may be exaggerated, nevertheless there are other effects of strategies based on cost-cutting:

Since fully fledged flexibility strategies tend to build up a reliance on low pay and casualised work, the result could actually be the discouragement of competition between firms on the basis of more positive improvements in areas such as technology, production methods and marketing.⁶⁶

Such an approach could be detrimental to long term sustainable development.

This counter-argument stresses the positive effect that the extension of "social protection" legislation would have on economic growth (the objectives of Article 2 and Article 117 are conceptualised as economic growth in both arguments). Examples of this argument can be found in the House of Lords' debate on the EC draft part-time employment policy, where Baroness David put forward an argument which established the connection between "social" protection and the desire for an improved economy, on the grounds that there was a link between the granting of employment rights (eg. increased training, ensuring of skills, higher wages) and stability in the workforce⁶⁷. In this debate, other comments were weighed against the alleged correlation between the level of "social" protection and the level of unemployment. For example, Lord Dean of Beswick said:

As I said, we now face increasing unemployment. That cannot possibly be attributed to too much regulation and employment protection. I do not believe that argument for one moment.⁶⁸

The TUC made the same comment to the House of Lords' Select Committee, this time specifically in connection with the levels of women's unemployment and the regulation of part-time work⁶⁹. Summarily, there is inherent in the examples of this counter-argument the view that the extension of "social" legislation will have a positive effect on economic growth,

66 cf. Grahl, J. and Teague, P. (1992): p173.

67 cf. Part-time and Temporary Employment: ECC report.

68 *ibid.*: p928.

69 cf. *op. cit.* note 57: p14.

as it will encourage stability, thus saving turnover costs, produce a higher skilled workforce, thus maximising on resources and will generally be beneficial to the market and, in consequence, will fulfil the objectives of Article 2 and Article 117 (much of this argument is based on the evidence gathered over the years concerning the employment of women and the extension to them of equality legislation).

The UK Government are keen to maintain a separation of "social" and "economic" aspects. Their line of argument refutes the relational aspect of "social" intervention to "economic" growth by arguing that "social" intervention will not positively effect "economic" development and, therefore, will not in turn produce "social" benefits for all (Article 2 and Article 117). The UK Government and employers associations/federations understand the word "social" here as meaning "on behalf of the employed", that is, in the narrowed meaning of the "social"⁷⁰. At this point, the UK Government's argument shifts and in fact introduces a corresponding meaning to the word "economic", which they proceed to use as meaning "on behalf of employers". They continue to advocate that "economic" policy (economic now meaning "on behalf of the employer") is required for the positive functioning of the "economic" (market) in order to create "social" benefits (Article 2 and Article 117). "Economic" (employer) policy would mean in this context greater flexibility, re-structuring of employment and competitive strategies.

The counter-argument responds to this shift in meaning and, still affirming the relational aspect of "social" intervention to "economic" aspects, argues that "social" action will have a positive effect on employers' strategies and so will further the Article 2 and Article 117 goals. In this manner, an agreement can be found in this debate that employers' strategies, eg. flexibility, will have a positive effect on economic growth. The disagreement still rests on whether "social" intervention will have a positive or negative effect on flexibility strategies.

⁷⁰ The idea that the "social" is understood here in the manner described is backed up by the fact at the British Government do not totally disagree with the idea of protection, ie. a form of hidden social policy. This can be seen in their insistence on ensuring that small and medium sized enterprises will not be priced out of the market and their refusal to agree to any legislation which would have this effect.

The UK Government's understanding is that "social" protection creates barriers for employers which hinder flexibility and discourages economic growth. The counter-argument argues that "social" protection prevents employers from adopting cost-cutting strategies and instead encourages flexibility on the basis of other factors, thereby sustaining economic growth in the long term.

Resolutions in EC Discourse

In this specific debate, two understandings of the interaction of the "social" with the "economic" occur: the one which sees them as operating in harmony with one another and the other which sees them as operating in conflict to one another. According to the debate, pursuing "Social Policy" at Community level will fulfil Treaty objectives and not pursuing "Social Policy" at Community level will fulfil Treaty objectives, both arguments being equally true. The impasse of arguments poses a problem for the Commission as it must resolve this apparent crisis in the "Social Policy" area⁷¹.

This is where EC discourse enters into the debate in the name of the "general interest" to resolve conflicting interests. The main problem here is that the Treaty itself is ambiguous on this point. The ultimate resolution to this tension is thus to reaffirm the aim of the market, which is to generate "social" advantages. The Commission's presentation of the Social Dimension has consequently been to insist that the regulation of certain "social" rights at EC level make economic sense. In this way, the Commission can present what amounts to "distortions" in different countries' Social Security provisions as "barriers" to the free market. Moreover, "social" intervention of this kind for market correction is already understood by the

⁷¹ The Commission, in the drafting of legislation, is continually aware of the fact that it must be accepted by the Council. If an unanimous vote is needed to enact law, then the pressure for a coherent justification is higher. According to the Treaty, laws intended to achieve the objective of Article 8a [i.e. internal market creation] need a qualified majority vote in the Council, whereas provisions relating to the interests of employed persons require an unanimous vote. Consequently, where there is an element of doubt involved in the meaning of the word "social", the Commission will use its power in the drafting of the proposed law in order to ensure the maximum possible likelihood of the law being accepted. The meaning and age of the word "social" will be crucial in this.

discourse as being a prerequisite to the achievement of the overall objective of the Community, to which all parties agree.

However, the underlying uncertainty of the direction of the Community in the "Social Policy" area can still be found in the EC texts described earlier. In these, the same word "social" is used in a variety of different contexts, with different meanings. Two understandings of the "social" are present in the preamble of the Social Charter:

[the aim of the Charter is] to consolidate the progress made in the social field, through action by the Member States, the two sides of industry and the Community....[and] to declare solemnly that the implementation of the Single European Act must take full account of the social dimension of the Community.

The discourse of the charter reflects the original argument, acknowledges the UK Government's and employers' arguments and presents the counter-argument. This accounts for the employers' criticism that the Charter is contradictory:

*the social consensus... is an essential condition for ensuring sustained economic development.*⁷²

Confusion also explains the difference in legal base of the draft directives Com(90)228 final and Com(91)228 final. The former does not use the word "social" as such, preferring instead "employment", thus explicitly stressing the reverse image of the Article 2 "social" and, thereby, proposing a Community law. The "social" in the latter document has a far wider meaning: it is used here much in the same way as it was used in the SAP, with all possible meanings inferred. The fact that this document does not contain a proposed Community law enables this usage. The four principles which "define the essential role of social protection" are listed on page 4 and are applicable to the "citizens" of the Community (rather than solely "workers") and not all risks are work related. This proposal thus constitutes itself as the equivalent of the "Community idea" of how national Governments should regulate their social policy areas, but does not argue that the Community itself should do this. It is, therefore proposing non-mandatory policy. Thus, ultimately, although there is an attempt here to resume some kind

⁷² cf. recital 5 of the Social Charter (op. cit. note 53). The goal of Article 117 is contained in the first recital; the fourth recital emphasises the importance of "creating" employment; recitals six and seven emphasise Article 117 thought; other recitals stress Treaty provisions. Evidently, there are contradictions in this Charter from the point of view of the degree of intervention it supports.

of control over the direction of "Social Policy", it can be seen that, in fact, there is great uncertainty over its future.

EC Conceptualisations of Part-Time Employment

Where does part-time employment fit into this debate? In this and the previous Chapter, I have detected two main conceptualisations of part-time employment at EC level. In the most recent proposals for a Part-Time Employment Policy, EC discourse clearly indicates a very specific conceptualisation of part-time employment. This does not even amount to an understanding of part-time employment itself, but a view of part-time employment protection legislation in the form of national State interventions in labour market functioning. EC discourse perceives differences in such domestic interventions as examples of distortions, which it then conceptualises as internal market "barriers". Discrimination between EC nationals, as understood by Article 7 of the EEC Treaty, is present in this understanding. The whole regulation of part-time employment is thus governed by the principles of the free movement of market forces and the idea of the levelling up of standards as upheld in Article 117 and Article 2. In this conception, the economic and social dynamics of part-time employment are hidden by the louder debate on the economic and social models of EC "Social Policy".

This conceptualisation differs from the one endorsed by earlier attempts to regulate part-time employment at EC level. In Chapter Six, I revealed that efforts were made by the Commission and the EP in particular to go beyond the understandings of labour market distortions from the common market point of view. These efforts involved a consideration of the reasons for State interventions and were concerned with analysing distortions within national labour markets. The model of labour market functioning on which these former draft directives were based was one similar to understandings made by the early segmentation theory. Here, part-time employment was conceptualised as a segmented employment form, "barriers" were understood in terms of segmentation barriers, problems of supply and demand

relations were acknowledged, as was the role of "sexism" operating in the market. Since this time, therefore, there has been a shift in the conceptualisation of part-time employment at EC level, with the result that today, it is understood chiefly in terms of internal market terminology.

Conclusions

EC discourse on Social Policy has over the years established a "general interest" position, which is that some "social" intervention is necessary for the establishment and successful functioning of the common market. This key tension is hidden by recent public debates on the "Social Policy" area. One of the main findings is that powerful "national interests" are weighed against this position and, with the collapse of traditional market models at national level, this has led to a general uncertainty with regard to the EC approach to Social Policy.

In the 1970s texts, "Social Policy" is presented as having a broad "social" goal. This presentation, however, obscures what is actually going on. The economic reading of these texts perceives a "social" intervention in the form of barrier removal, ie. a "social" for solving "economic" problems, the reverse image of the Article 2 model. In the 1980s texts, it is argued that "social" interventions, all be they necessary to prevent "social" decline, are also necessary for the functioning of the market. So, again a "social" is desired for the "economic", this time a "social" connected to market functioning. Contradictions in EC discourse on Social Policy at this time are explained by a further difficulty. This latter complication arises from the need for collective agreement in order to regulate in an area which does not hold a clear and precise Treaty mandate to do so. The debate which ensues appears in the form of the old welfare interventionists versus free-marketeers distinction, masking the reverse image of the Article 2 model. The insistence by the UK Government to keep the "social" goal separate from the "economic" goal produces another mutation of the "economic" and culminates in an

impasse of arguments. The net result of this is seen most recently in the signing of the Social Protocol by eleven Member States at the Maastricht Summit, a real headache for all.

Thus, it can be seen that there is much tendency to keep the "economic" separate from and oppositional to the "social". It has been demonstrated here, however, that the "economic" and the "social" are not separate and that, in fact, the "social" is in the "economic" in many ways. This is seen most clearly by an economic reading of the "Social Policy" Title and EC discourse on Social Policy, where it is understood that "social" intervention is required in a variety of forms for the creation and functioning of the market, in other words, that the "economic" is in many instances dependent on the "social". The subordination of the "social" to the "economic" is therefore not a simple one. The thrust of this chapter illustrates that in fact the KEY meanings of the "social" are in relation to the "economic" rather than in contrast to it. This is shown through the exploration of the reverse image of the Article 2 model which understands that there are "social" conditions necessary for the Article 2 model to function effectively. The most important tension between the "economic" and the "social" is therefore one within the economic priority system.

This larger debate on "economic" and "social" dynamics of EC "Social Policy" has recently obscured the economic and social tensions present within part-time employment policy. Although distortions in national market functioning in the form of segmentation barriers were recognised in 1980s EC texts, this understanding of distortions has now been replaced by specific conceptualisations of distortions as EC internal market "barriers". This means that today it is highly unlikely that the recognition of the process of segmentation at national level will give rise to an EC Policy of "re-evaluation" of part-time employment (within the consequentialist position) unless it can be justified according to EC internal market reasoning.

CONCLUSION

This thesis has examined the legal regulation of part-time employment, in the context of the European Community (EC), by looking at two National Policies, the UK and France, alongside EC Policy itself. The approach I have taken was to explore the complex interweaving of economic and social factors at the level of theoretical conceptions of labour market functioning and part-time employment and at the level of national and EC law as policy. While remaining committed to the question of which legislative intervention would best suit the needs of part-time workers, I found that important theoretical concerns of labour market functioning in this regard stemmed from considering employer goals and the means employers chose to meet these goals. I applied this approach to National and EC law as policy and analysed it in relation to its goals or end objectives and the means it utilised to achieve these goals or end objectives. Such examination revealed national and EC policy conceptions of labour market functioning and part-time employment and enabled a comprehensive analysis of the economic and social dynamics of Part-Time Employment Policy.

This conclusion draws the findings of the thesis together under two headings: the theoretical conceptualisations of labour market functioning and part-time employment, and conceptualisations of labour market functioning and part-time employment in national and EC law as policy. This enables a summation of the various models of economic and social relations located throughout the thesis.

Theoretical Conceptualisations of Economic and Social Dynamics

Labour Market Theory - Four Models of Labour Market Functioning

Labour Market Theory was examined in Chapter One in order to come to some kind of understanding of the character of part-time employment. The Chapter began by being involved with the question of why part-time employment was worked predominantly by women, and by married women in particular, and why it was a low paid and low protected

form of employment. Through an analysis of key developments made by Labour Market Theory during the course of the 1980s in particular, Chapter One demonstrated the mutual influences Labour Market Segmentation (LMS) theory and theories of women's employment behaviour had on one another in the building of an advanced LMS theory. It was shown how both were keen to answer the question of why women were concentrated in specific labour market sectors or segments, which were on the whole low paid and unskilled, such as part-time employment. LMS theory was keen to answer this question in relation to other "minority" groups of workers. Theories of women's employment behaviour were keen to apply LMS findings to the question of women's labour market behaviour.

This question was answered through an exploration of the causes and consequences of segmentation barriers which were found to exist in the labour market and which had a negative effect on socioeconomic mobility. The main body of Labour Market Theory was concerned to discover the causes of such barriers. I found that its findings highlighted the need to answer another question prior to the one asked by the theory of why employers chose particular employment structures. This involved exploring employers' economic goals and the means by which they achieved these goals. I realised that the consequences of segmentation barriers was a crucial factor in the choices made by employers on the means chosen to achieve economic objectives. Consequently, therefore, the theoretical attentions of Chapter One operated around the questions of both the causes and the consequences of labour market segmentation barriers.

From the survey of ideas raised by the theory explored in Chapter One, I in fact detected four main models of labour market functioning: the neoclassical model; the dual labour market model; the early segmentation model and the advanced segmentation model. I shall now summarise each model in turn.

The Neoclassical Model

The starting point of Chapter One was the neoclassical model of labour market functioning. The neoclassical model of labour market functioning was understood as offering a view of labour market processes which was to be opposed by the LMS position. Indeed, the birth of LMS theory, in the form of what I generally referred to as the dual labour market model, was induced by dissent from neoclassical theories on the operation of the US labour market. However, the neoclassical model was not totally abandoned by this early LMS theory, which still understood the secondary labour market to be operating at times in accordance with neoclassical theories.

There were four principle features of the neoclassical model which are important to emphasise once again. Firstly, this model believed labour market practices to be free and neutral operations. Value accorded work was thus seen as being truly equated to the skill required by the job - the structuring of "skill" was also understood as a free and neutral process of economic functioning. Secondly, although the model recognised labour market barriers, they were firstly viewed as institutional and legal barriers and secondly as mere market imperfections - they were not conceived of as causing worker stagnation.

Thirdly, demand and supply relations were similarly perceived of as being free and neutral. For example, demand for workers was viewed in terms of economic demand for workers with appropriate skills, and workers were seen as freely supplying their services to the market. There was an element of "choice" in the supply of labour to particular jobs.

Finally, this model had a specific view of the manner in which "sexism" operated in the market. Accordingly, "sexism" was perceived of as a force, external to market processes, which entered into the market and distorted otherwise free and neutral practices.

Dual Labour Market Model

The birth of the dual labour market model marked a point of departure from the neoclassical model described above. The ultimate departure was however achieved only in stages - the dual labour market model punctuating the first of these. Again for the summary, I have divided its features into four main parts.

Firstly, the dual labour market model abandoned the neoclassical understanding that market processes are free and neutral. Instead, it located distortions in labour market functioning in what it termed the primary sector of the labour market. The primary sector was, according to this early model, composed of firm-based internal markets, which functioned according to set rules. Value accorded to jobs was seen to be determined more by the rules of allocation of labour than by its actual value. In this manner, the model understood that the wages of primary sector jobs were artificially structured.

Secondly, the model perceived barriers existing between the primary and secondary sectors of the labour market, which impeded free movement of certain groups of workers, eg. Black workers, into the primary sector. Such barriers were conceptualised as access-barriers to the primary market and were linked with socioeconomic mobility. How such barriers were being constructed was uncertain according to this model, but known to be the result of the complex interweaving of economic and social relations, inflected through demand and supply factors.

Thirdly, and as a result, the dual labour market model realised that demand and supply factors were not operating in a free and neutral manner, but were determined by "other" Internal Labour Market (ILM) factors, eg. "custom", operating at the workplace. The model located certain influences whose relationship to one another was ambiguous. The model understood that ILM factors were affected by the social organisation of production, alongside possible influences of social factors operating outside the workplace. Finally, the dual labour market model noted that "sexism" (and "racism") were at play in labour market processes and

indeed shaped supply and demand factors, thus effecting barrier-construction. Exactly how this was occurring was not fully understood by this model.

Early Segmentation Model

This early segmentation model, although at times building on what amounted to commonplaces of the dual labour market model, did start to clarify some of the more muddled aspects of its predecessor's interpretations of labour market functioning. Firstly, the early segmentation model located distortions in both the primary and secondary segments of the labour market. The primary segment - at times still labelled sector¹ - was not seen to be firm-based, but was found both within and across firms. Both primary and secondary segments were linked with employment types, so that firms were understood as being composed of both primary and secondary employment. Each employment type was seen as being determined by a different set of rules, in that the neoclassical equation of wage to value was now understood as being distorted in both primary and secondary segments.

Secondly, labour market barriers were understood as existing not only between primary and secondary segments, but also as access-barriers to both primary and secondary segments. Recognisable groups of workers were concentrated in each segment. Thirdly, this model formulated much clearer understandings of supply and demand relations and how these affected barrier-construction. The model was particularly keen on understanding both the conditions under which labour was supplied to the market and also "assumptions" made by employers about a "suitable" supply of labour.

Finally, this model made a considerable contribution to the argument through its examination of where "sexism" entered into the segmentation process. The model understood that the labour market reproduced both sex and race discrimination. "Sexism" was conceived, according to this model, of being external to labour market processes - it existed in

1 One set of commonplaces was indicated by the use of the old term sector, rather than segment.

institutional structures outside the labour market, which prevented women from selling their labour as men did. The neoclassical notion of "choice" was thus ousted by this model. Instead, "sexism" existed as a barrier to market entry (again it was a barrier to both the primary and secondary segments). But, although "sexism" was conceptualised as an external force apparent in "assumptions" made by employers on women's suitability to secondary employment, nevertheless the model noted that evidence of women's employment behaviour influenced demand decisions by employers and especially the "assumptions" made by employers about "suitable" workers. Hence, a relationship between evidence and ideology was hinted at by this model, although "sexism" was still left outside labour market processes.

In Chapter One, I argued that the main limitation of this model was its focus on causes and "sources" of labour market disadvantage of women, rather than consequences. This focus was cast in terms of causes of segmentation barriers. As such, it amounted to a theoretical questioning of barriers through a causes or sources doctrine. Given that the neoclassical notion of "choice" could no longer apply, this model was keen to re-examine the question of why part-time employment was worked predominantly by women. As a result of this focus, the model interpreted the role played by "sexism" in the shaping of supply and demand decisions on the basis of two oppositions which I later, through a focus on consequences rather than causes, demonstrated to be false oppositions. The first opposition weighed "sexism" against "economic need" in efforts to determine why so many women worked in part-time employment. The second opposition played out this question by arguing that part-time employment was created for women because of sexist "assumptions" made by employers about women. It weighed "true" assumptions versus "false" assumptions and attempted to answer the question "are the assumptions made about women true or false?". This question was answered by the model as follows: either yes, the "assumptions" are true, but the reason why they are true is due to institutionalised sexism², or no, they are not true and what we have here is an example of false ideology. In both these oppositions, "sexism"

2 This is Barron and Norris' approach (cf. op. cit. note 1).

was understood to exist at the level of ideas and be external to the supply and demand circle - this understanding would later be questioned by the advanced segmentation model.

Advanced Segmentation Model

The advanced segmentation model rejected both the neoclassical and dual labour market models. Firstly, the labour market was perceived of as a "segmented market". The segments were divided into core and periphery groupings and specific employment types were linked with specific segments. Distortions were located in all segments - all wages were understood to be artificially structured.

Secondly, barriers were seen to exist between segments. This model focused on socioeconomic mobility and emphasised the lack of movement between segments. Again, and similar to the early segmentation model, this advanced model noted that certain groups of workers had been concentrated in specific employment types, eg. groups of women (and married women, in particular) worked in part-time employment. Moreover, barriers located by this model were not only conceptualised as access-barriers, but as segmentation barriers which were integral to the labour market.

Thirdly, and importantly, the advanced segmentation model detected a collapsing together of economic and social factors, again inflected through a collapsing together of supply and demand factors. Supply and demand were seen as being intricately interwoven into one continuum of supply and demand. No meaningful separation of supply and demand factors was acknowledged by this model. This understanding thus forced a re-consideration of barrier-construction which took on board the notion of inseparable supply and demand factors.

In Chapter One, I added to this model an understanding of how "sexism" would be understood as operating in the labour market through what I labelled the process of "engendered segmentation". This differed from the early segmentation model's understanding

of women's labour market disadvantage, in that the focus was shifted from the question of causes to the question of consequences of barrier-construction. In the natural progression of the theory, the original focus on causes was not surprising, given the original question asked on why certain groups were concentrated in certain segments. But, as the collapse of supply and demand factors became evident, a new model explaining the role of "sexism" in the process and based on consequentialism became imperative.

The model of engendered segmentation understood that "sexism" was internal to labour market processes. According to this model, the employer's decision to create part-time employment had already been determined by the supply of labour available, institutional factors and other costs factors. This decision was then abstracted from features of women's employment in the past and built into the search for a "suitable" workforce, ie. it was built into the subsequent demand for labour. The abstraction was facilitated by "sexist" ideology. By abstracting from reality and building the abstraction into the demand, the employer was understood to reproduce the discrimination. The consequence was that the economic demand became a demand structured with sexist assumptions. In this fashion, a total collapse of supply and demand factors was realised.

The main important understanding which this model gave rise to was that a market denial of the economic value of part-time employment had occurred. The low pay status of part-time employment was thus explained by the process of engendered segmentation. This was in keeping with the dawning realisation that all employment segments were artificially structured - no level of pay reflected a "true" market value.

EC Model of Labour Market Functioning

The above four models of labour market functioning were based on observations of national labour markets. There was a fifth model of market functioning revealed in the thesis -

the model of European Community (EC) internal market functioning³. Although not a theoretical position as such, this was concerned with theoretical understandings of internal market functioning. This EC model was based on ways of both creating an internal market and of coping with any problems such a market would produce. Member States' markets were conceived of by the model as separate markets with national barriers around them. In this manner, barriers existed between Member States. Common market distortions amounted to differences in national state interventions in market functioning, in the form of state subsidies, for example. Such distortions arose from, or had as an effect, discrimination. Discrimination was understood by this model as discrimination on the grounds of nationality, ie. discrimination between Member States' nationals - this is in Article 7 of the EEC Treaty and I shall refer to this discrimination as "discrimination in the Article 7 sense".

The important difference between this theoretical model and national theoretical models was that the distortion in question was only a distortion in the form of a state intervention, ie. a distortion in the ways Member States intervened in national markets. Distortions within national markets which did not exist in national law were not automatically conceptualised as distortions. This was seen clearly in an analysis of Article 119, EEC Treaty. I used this Article as an example of a distortion in state intervention which was conceptualised as a barrier. The distortion existed in differences between Member States in their intervention in the level of pay accorded men and women, eg. France had a law which granted men and women equal pay, whereas other Member States, eg. the Netherlands, did not. This difference in intervention had to be ironed out. Discrimination was seen to exist here in the Article 7 sense.

Arguably, Article 119 touched on distortions within national markets, ie. distortions caused by "sexism" (in the early segmentation model understanding). But, that the effect of Article 119 was to rule on national labour market distortions can be seen to be secondary. The

³ cf. Chapter 7. In fact, Chapter Seven pointed to three separate and potential internal market models at EC level. cf. Pelkmans, J. and Winters, A. (1988).

function of Article 119 in terms of the Treaty model was not overtly concerned with the question of how the difference in pay between men and women was "caused", ie. why national markets had distortions, or the "causes" question. Nor was it primarily concerned with the "consequences" question. The analysis of this Article and other Treaty Articles in the Social Policy area revealed a distinct EC understanding of both barrier and distortion construction which was distinct from national labour market models' understandings.

In summary, in this thesis I located five separate models of labour market functioning derived from theoretical understandings of economic functioning. Each had its own understanding of labour market barriers and distortions, demand and supply factors and the role of "sexism" in the labour market process. These economic models only partially map onto part-time employment conceptualisations found in policy-formation discourse. Four such concepts may be distinguished. I described these views in detail in Chapter Five of the thesis. I intend to briefly summarise these views now, making analogies with the labour market models above.

Conceptions of Part-Time Employment

The first view of part-time employment described in Chapter Five could in fact be neatly mapped onto the neoclassical labour market model. The low pay status of part-time employment denoted a lower skill requirement. Women, in particular, were understood as desiring part-time employment and this accounted for the large numbers of women working in it. Any market value accorded part-time employment was considered to be a free and fair value.

The second view of part-time employment could be mapped onto some aspects of the early segmentation model. This view perceived part-time employment as a secondary employment, with an artificial structuring of the wage. Additionally, barriers were seen to exist between primary and secondary sectors (another example of the usage of dual labour market commonplaces). Where this view of part-time employment departed from the early

segmentation model was in its conceptualisation of part-timers as "gender-neutral" workers. This view was not overtly concerned with the part "sexism" played in the segmentation process. This view did, however, realise that a market denial of value had occurred, although the reason for this was not openly of concern.

The third view of part-time employment did not really "fit" into any of the labour market models. Indeed, this view was really focused on women as workers, rather than labour market functioning as such. Accordingly, this view argued that the working-time arrangement of part-time employment was beneficial to women, but the low pay status had to be rectified in order to value women in the labour market. This view consequently realised that a market denial of value had occurred and that this was connected with the numbers of women working part-time.

The fourth view of part-time employment straddled both early and advanced segmentation models. This view argued that neither the working-time nor the secondary status of part-time employment were advantageous to women because both these features locked women into their secondary status in society. This view was either against the concept of part-time employment for women alone, or in some cases, was against the notion of part-time employment altogether. In both instances, this view realised that a market denial of value was occurring on a systematic basis.

Finally, the fifth view of part-time employment located in the thesis was specific to the EC approach. According to this view, part-time employment was not so much conceptualised as an employment form, but as part-time employment legislation. This view ignored the whole question of market denial of value.

Policy Conceptualisations of Economic and Social Dynamics

All the theoretical models of labour market functioning and views of part-time employment described throughout the thesis were moulded on distinct understandings of economic and social dynamics. My main concern with national and EC law as policy was to determine exactly how such economic and social relations were being deciphered. The main theoretical concerns had arisen from the exploration of employer economic goals and the means employers chose to achieve such objectives. Employer goals were described as "flexibility" goals; the means to achieve "flexibility" was through the segmentation of employment. Such observations led the theory to focus on the segmentation process. Main theoretical questions resulting from this focus were concerned with the causes and/or consequences of segmentation barriers. The interaction of supply and demand factors was observed in order to tackle these questions. Economic and social dynamics operated within this debate, in that they were inflected through supply and demand factors.

Consequently, with regard to Law as Policy, the approach I adopted in the thesis was to explore law in terms of its acclaimed goal and the means chosen to achieve such a goal. The thesis considered the various goals the law was seeking to achieve and reviewed the legislation as a means to achieving these goals. Laws were seen as having both economic and social goals. But, no matter what the ultimate goal of the law in question was, I found that it operated on a specific conception of labour market functioning. This meant that each law had its own understanding of supply and demand factors and therefore of economic and social labour market dynamics.

In relation to both Sex Equality Law and Part-Time Employment Law as Policy, I detected certain links between the theoretical concerns of labour market functioning and legal concerns of labour market functioning. Such links were traced by analysing law as it operated on the causes/consequences debate. Through the exploration of how the law conceptualised labour market functioning, it became clear that there was, in some circumstances, a legal

questioning of the causes and/or consequences of barriers, which could be compared to the theoretical questioning of the same. This meant that in some cases the law was concerned with the question of why labour market barriers existed and in others it was concerned with the effects of such barriers.

The second part of the conclusion will thus concentrate on conceptualisations of economic and social dynamics in national and EC policy, by linking such conceptualisations to the theoretical understandings described above and summarising the key arguments made in the thesis.

National Part-Time Employment Policy - the UK

The goals of UK Part-Time Employment Policy were shown in Chapter Five to be the encouragement of employer flexibility and job creation. These goals were clearly labelled in Government rhetoric as "economic". The means of achieving these goals was by not regulating part-time employment - ie. by not enacting any form of law which dealt specifically with part-time employment. Such policy was labelled "social" by UK Government sources. In this manner, the goal was an "economic" goal and the means to achieve this goal was through the non-enactment of "social" policy. Economic and social policy were not only held as being separate and distinct, but moreover social policy was argued as having a negative effect on the economic goal envisaged.

UK Part-Time Employment Policy, although not operating directly on the market, nevertheless had a certain understanding of both labour market functioning and part-time employment. Government rhetoric on part-time employment policy indicated an understanding of part-time employment which fitted closely with the first concept of part-time employment as described above. This in turn implied that the UK Government's understanding of labour market functioning was one which aligned itself most appropriately with the neoclassical model. The value of part-time employment was seen as being neutrally determined through the free functioning of market forces. UK Government policy did not

recognise that any market denial of value had occurred - the process of segmentation was indirectly denied by Government rhetoric.

This was apparent in UK general labour market policy, which was one of de-regulation. This involved the aim to remove barriers which prevented the free movement of market forces. These barriers were not segmentation barriers, however. These were barriers conceptualised as legal barriers: they were understood in the form of social protection law which created unnecessary costs to employers. In this manner, UK Policy's conceptualisation of barriers was likened to that of the neoclassical model.

Such a view implied a denial of other labour market models and, as a result, the denial of the theoretical questioning of barrier-construction, as understood by the causes/consequences debate. The thesis thus established a link between the separation of economic and social goals, the neoclassical model and the denial of the causes/consequences debate. This was particularly evident in the answering of the question of why women work in part-time employment. According to UK Government views, this happened because women chose to work in part-time employment. Where "sexism" did exist, it was understood as coming under the remit of Sex Equality Law, which dealt with "sexism" as an external force distorting otherwise free and neutral economic functioning. The simple answer of "choice" to the causes question thus removed the need to find other reasons for the concentration of women in part-time employment and allowed the whole process of segmentation to be overlooked. Part-time employment was not considered as a segmented employment and, as segmentation barriers were denied, no legal questioning of them was considered.

National Part-Time Employment Policy - France

The goals of Part-Time Employment Policy in France did not easily fall under distinct "economic" and "social" headings. The overall goal of the policy was to create more jobs and encourage "flexibility". However, unlike the UK, "flexibility" in French Policy was not understood solely in terms of employer requirement. On the contrary, part of the policy was

aimed at encouraging worker "flexibility", that is movement in and out of part-time employment, and was understood as an essentially "social" measure. Economic and social goals were rhetorically held in Government discourse to be mutually beneficial. However, I did note that the economic and social aspects of the policy were linked in such a way to ensure that the "social" could have a positive effect on the "economic".

French Part-Time Employment Policy chose as its means the enactment of an equality principle between full- and part-time workers - the "principle of non-discrimination". Additionally, it enacted specific laws pertaining to socioeconomic mobility in and out of part-time employment. In Chapter Five, I argued that this approach indicated an understanding of labour market functioning which acknowledged the labour market segmentation process in its early form. This was deduced from the knowledge that the principle of non-discrimination holds as one of its functions the artificial re-accordance of value to part-time employment which has been denied by distorting market processes. The selection of this equality principle thus revealed an awareness of segmentation in some form and a wish to redress it through the social protection of workers. Additionally, the decision to regulate and encourage movement in and out of part-time employment also demonstrated a commitment to deal with the effects or consequences of the segmentation process. Summarily, the acknowledgment of segmentation in some form was indicated by the policy which amounted in the abstract to a legal involvement with the consequences of segmentation.

The thesis thus established a link between the connection of economic and social goals, the early segmentation model and the causes/consequences debate. In Chapter Five, however, I explored these factors further to discover more about the question of how the principle of non-discrimination could be tied to the theoretical questioning of the consequences of segmentation. I discovered that in French Part-Time Employment Policy, the principle of non-discrimination in fact had a goal other than the tackling of the effects of segmentation. The principle was used in French Law not only to redress market failures by granting part-timers equal rights with full-timers, but also to encourage employers to create more part-time

employment by adjusting costs of employer social security contributions. In other words, there appeared to be a contradiction within the usage of the principle which was, on the one hand, to tackle the effects of segmentation and, on the other hand, to encourage the process of segmentation. Moreover, I found that there was a greater weight placed on the "economic" side than on the "social" side of the principle, with the result that the social protection aspect became subordinated to the goal of economic flexibility.

This inability of the principle to fully redress the consequences of segmentation was arguably offset in French Policy by the existence of other laws which did acknowledge segmentation barriers and indeed sought to remove them. However, the conception of labour market functioning which these laws embodied was not one based on the advanced segmentation model and so, even given the re-evaluation which the policy endorsed, it could be seen that there was no legal questioning of the consequences of segmentation which came close to the theoretical questioning of the same as proposed by the advanced segmentation model.

Sex Equality Law

Part-Time Employment Policy was not the only form of policy discussed in the thesis which was based on a specific conception of labour market functioning. In Chapters Two, Three and Four, I highlighted two important groups of national law which operated on notions of labour markets - Sex Equality Law (SEL) and Social Security Law.

Chapter Two's examination of UK SEL revealed that this law operated on the basis of a specific conceptualisation of labour market processes in order to achieve its social objectives. This was revealed in Chapter Two through an analysis of three key structural aspects of SEL and how they understood "sexism" to be operating in the labour market. These structural aspects were the comparator test, barrier removal and the objective justification test. These aspects, common to both direct and indirect sex discrimination, collectively sought to locate and potentially remove labour market "barriers". According to SEL, there were two

main groups of discriminatory barriers - those which were sex-based (direct sex discrimination) and those which were neutral but whose effect was discriminatory on grounds of sex (indirect sex discrimination). In my analysis of the potential operation of SEL on the market, I found that there was an ambiguity in the law's exact understanding of barrier-construction, which seemed to be based on a mix of different models of labour market functioning. This was particularly evident in the consideration of the legal questioning of barrier-construction adopted by SEL. Under direct sex discrimination, such legal questioning clearly placed an emphasis on the finding of causes for the barrier, to determine whether it was sex-based. Under indirect sex discrimination, the focus of the questioning was, at first glance, on the consequences of the barrier, ie. it was not really interested in the reasons for the construction of the barrier, but its effects. But the objective justification test used under indirect sex discrimination in fact re-conceptualised the whole notion of barriers once more according to the "sources" doctrine by ultimately placing the emphasis on the reason for the barrier. This meant that even where a barrier was found to cause indirect discrimination, it could be left untouched by SEL if the reasons for it were objectively justified.

In the end, I argued in Chapter Two that SEL suffered from the same problematic assumptions made by the early segmentation model in its causes/sources doctrine. This was a clear-cut case when applying the concept of direct sex discrimination. However, with the concept of indirect sex discrimination, such suffering was less apparent. It was argued that the objective justification test almost moved the whole debate into the area of consequentialism, but was hampered at the last moment by the causes question. As a result of this, it was still felt possible to separate supply and demand factors in establishing sex discrimination in the labour market. This ignored the findings of the advanced segmentation model, which revealed a collapse of supply and demand factors. Summarily, SEL appeared to be operating around the two false oppositions borne from the "sources" doctrine and this, I argued, revealed its ultimate limitations⁴.

⁴ This in fact reveals a more general problem of SEL and can be seen to be occurring at EC level well. cf. Prechal, S and Burrows, N (1990): p74 et seq..

Social Security Law

Social Security law was also considered in the thesis as a law with social objectives which operated on certain understandings of how women could be employed in labour market processes. Such understandings were found to shape Social Security Law, in the means it chose to achieve its objectives. In both the UK and France, the goal of Family Policy was the same - to increase population figures. However, the means chosen differed, dependent on the way in which National Family Policy understood women's potential earning power. I found that conceptualisations of women's potential employment behaviour in the 1950s still remained in the Social Security provisions today and had important bearings on the nature of part-time employment. Legal denials of women's economic earning power were found to exacerbate the market denial of value. Summarily, even where a law was seen to hold an essentially social goal, its operation on the labour market was highly influential on the structuring of employment.

EC Part-Time Employment Policy

Efforts to regulate part-time employment at EC level involved the placing of draft part-time employment policy under the more general heading of Social Policy. As a result, draft part-time employment policy not only held its own economic and social goals, but also operated under the larger tension of EC "social" and "economic" policy goals. Because of this, I have divided the Conclusion into looking at both EC economic and social goals and EC part-time employment goals.

In Chapter Seven, I argued that the EEC Treaty upheld a specific understanding of common (internal) market functioning as presented in Article 2 of the Treaty. According to Article 2, the economic goal of the establishment of the common market would, when functioning, yield social benefits, ie. the broad "social" goal of Article 2 was dependent on some "economic" policy. But, through an economic reading of the Social Policy Title, I additionally detected a reverse image of the Article 2 model and came to realise that according to this understanding, the economic goal of establishing a common market was itself

dependent on some form of Social Policy. This understanding was best explored by re-considering the model of the "establishment and functioning" of the common (internal) market. This was undertaken by looking at Article 8a of the EEC Treaty.

The first task of the EC plan was to remove any barriers which existed between Member States and which impeded the free movement of goods, services, capital, workers or persons. This was seen to be clearly indicated in Article 8a of the EEC Treaty - Article 8a was analysed at length in Chapter Seven. Very straightforwardly, the first stage of the model was one of dismantling barriers between Member States and replacing them with Community law where necessary. This stage was termed "market creation" in Chapter Seven.

The second stage of the model was the ironing out of distortions - this stage came under the heading of "market functioning". Chapter Seven described the distortions as understood at EC level. This meant that if there were differences in State Intervention in the Social Policy area as between Member States and these differences were understood as creating distortions, and conceptualised as barriers, then this provided justification for EC intervention in the Social Policy area. Any Part-Time Employment Policy would thus be dominated by this.

Although there is no EC Part-Time Employment Policy, attempts to regulate part-time employment have been made, however, and in Chapter Six of the thesis, I traced these struggles over its regulation and uncovered key problems of policymaking in this area. I found that part-time employment policy-making could be divided into two phases. Each phase indicated different conceptions of part-time employment and its relation to internal market functioning and national labour market functioning.

In the first phase, at the beginning of the 1980s, I found that the larger common market understanding of "distortions" although present, remained in the shadows. This early policy was interested in the reasons for the undervaluing of part-time employment and was

keen to tackle the effects such undervaluing produced. I consequently located the causes/consequences debate in the early phase of EC part-time employment policy concerns. This meant that the regulation of part-time employment was not being considered solely in terms of internal market functioning, but that additionally conceptions of part-time employment were being formulated on the basis of models of national labour market functioning. Indeed, the early EC document presented the second, third and fourth views of part-time employment as described above. This implied an acknowledgement of the segmentation process.

Although the lines of authority employed by the early draft directive on part-time employment referred to the larger common market understanding of distortions in the form of costs, the content of the directive indicated an attempt to tackle the effects of segmentation. This was to be achieved through the enactment of the principle of non-discrimination and also the enactment of other laws regulating movement in and out of part-time employment. Some segmentation barrier-removal was thus supported. As with France, however, barriers were not conceptualised as advanced segmentation barriers, but as early segmentation barriers. Summarily, in this early phase, some of the causes/consequences questions were posed in draft EC law as Policy.

In the first phase, EC law as policy had as a goal job creation: the regulation of part-time employment was seen as only a partial means to this end. Reversely, part-time employment policy itself had another goal, which was the legal questioning of the effects of segmentation barriers. Once again, therefore, the thesis established that there was a connection between the linking of economic and social goals, the early segmentation model and the causes/consequences debate.

The second phase of attempting to regulate part-time employment moved the relations of economic and social goals from out of national labour market functioning and placed them firmly within the sphere of internal market functioning. The draft directives of the 1990s

clearly understood the regulation of part-time employment in the larger context of EC Social and Economic dynamics. Now, the need for Part-Time Employment Policy was argued in EC barrier/distortion terminology. The Commission set out to prove that differences in State Interventions in levels of social protection afforded part-timers would, if left to differ, cause distortions in the internal market and result in unfair competition. Consequently, these differences had to be ironed out in the form of an EC Part-Time Employment Policy which would be applied uniformly throughout the EC.

This more recent approach dropped the questions of the causes/consequences debate, implying an ignoral of the segmentation process. This is evidenced in the content of law which was only concerned in applying the principle of non-discrimination to social security costs and weakly regulated other aspects of the employment. There was no real attempt made in these directives to dismantle segmentation barriers. Importantly, the application of the principle of non-discrimination to the area of pay was left out. The effect of these directives could well have been the removal of some of the barriers as understood by segmentation models, but this would have been a secondary consequence of theses laws. Summarily, the enactment of Part-Time Employment Policy, and the principle of non-discrimination became purely an internal market measure.

In the second phase, the goal had changed to be specifically the creation of the internal market. The EC legal questioning of barriers and barrier-removal now took on a distinct function in relation to EC understandings of internal market barriers and larger "economic" and "social" goals. The means to achieve the goal was through the ironing out of "social" distortions, conceptualised as barriers. This understanding did not imply a recognition of segmentation understandings of barriers in national labour markets. However, there was still a connection between the linking of economic and social goals and a form of segmentation. But here, segmentation was a segmentation with a distinct EC meaning - a segmentation of the regions.

Summary

If the arguments of this thesis were to be reduced to a single characterisation, it would be as follows: firstly, the most advanced forms of LMS analysis point to a consequentialist understanding of segmentation - this means that whatever the origins of segmentation were, they are now internally instituted in economic calculations; secondly, closely bound up in this line of development is the recognition that the distinctions supply and demand are now artificial and this indicates a "collapse" of economic and social factors; thirdly, national Social Policies fail to follow this recognition of market functioning - the UK still operate on a more neoclassically-centred understanding of markets (with a very limited conceptualisation of segmentation apparent in SEL), while the French are operating within a cycle of promoting and removing the effects of a segmentation understood on the basis of the early segmentation model of market functioning; fourthly, EC policies, while in the early phase conceptualising market functioning on the basis of the early segmentation model, now operate within EC understandings of internal market functioning; finally, theorists studying within these fields still tend towards a causalist understanding of policy difficulties.

In conclusion, a few more words need to be said on the future of EC Social Policy. I have shown in Part IV of the thesis that as the regulation of part-time employment at EC level falls exactly into the specific debate on "Social Policy", this poses great problems for future Part-Time Employment Policy. Any resolution of this debate in practice is not immediately forth-coming, given that its outcome is the signing of the Social Agreement of the Maastricht Treaty. According to this, eleven Member States will now proceed to regulate "social" aspects to further the objectives of the Single Market, whereas the UK Government will not. Whether such policy can be considered as Community Law (and therefore be applicable to twelve Member States) is unlikely, but this leaves unanswered questions surrounding the exact nature

and legal basis of such policy⁵. Does the Social Agreement in fact imply the end of a Community Social Policy?

But, the uncertainty on policy direction is not simply a result of the row between the UK and the other EC Member States. Clearly, all understandings of traditional market models are being challenged by recent changes in labour markets, the recession and globalisation of trade. Additionally, and importantly, changes in labour markets also challenge Treaty "economic" and "social" goals. However, the Treaty understanding appears to have difficulties taking on board challenges from actual changes in market structures, which themselves demand a new way of looking at market regulation. This raises the question of whether internal market objectives can be re-considered in the light of national market changes, or whether old understandings of the relations of "economic" and "social" will continue to dominate policy-making. Even without the UK, therefore, a stormy future lies ahead.

⁵ This point was mentioned on many occasions in my interviews with Commission DGV officials.

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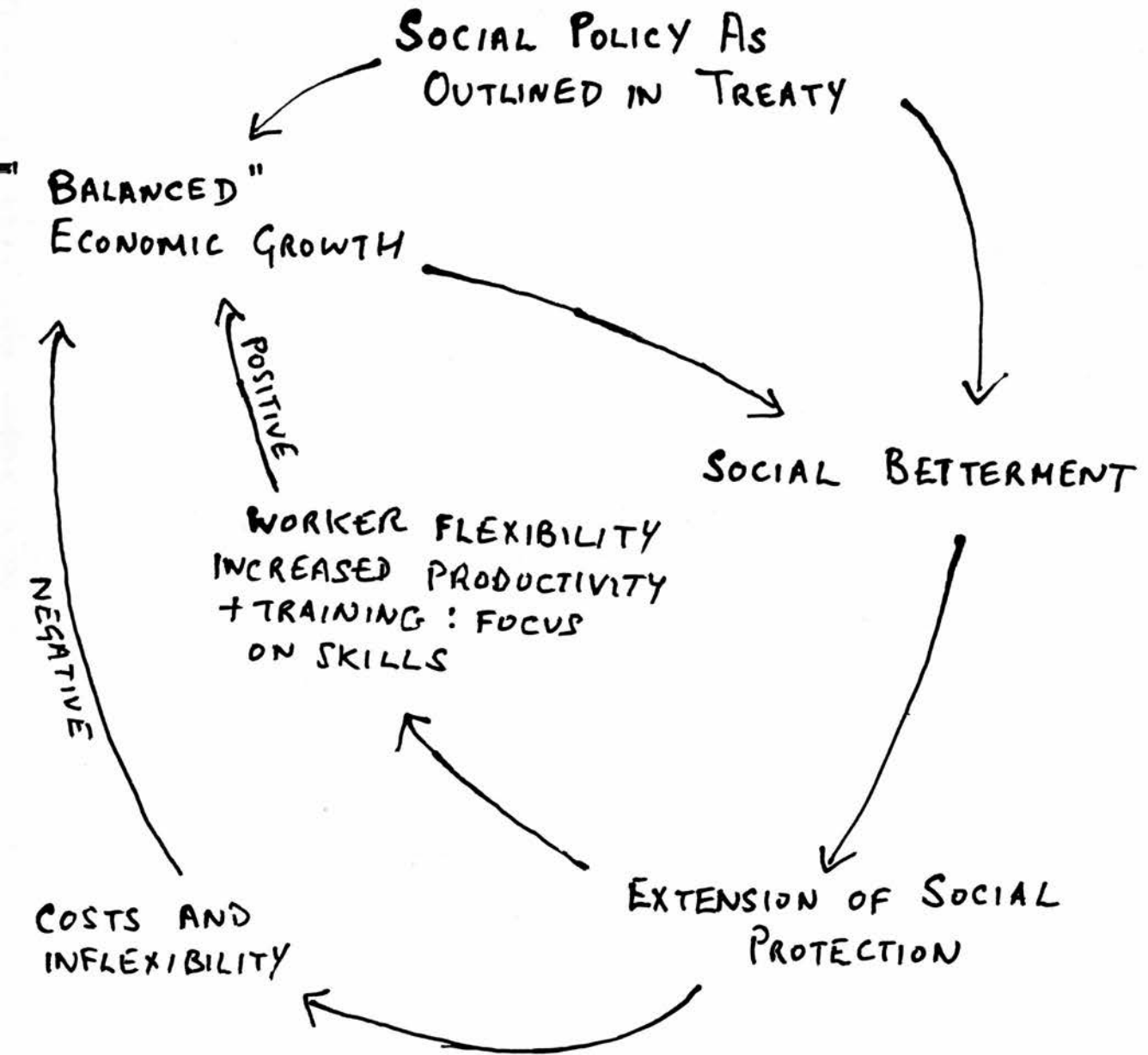
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APPENDIX I

EC DISCOURSE OF SOCIAL POLICY-FORMATION

Model (i)

→ = PERCEIVED EFFECT ON

EC DISCOURSE ON ECONOMIC GROWTH

Model (ii)